

"NICOLAE TITULESCU" UNIVERSITY OF BUCHAREST  
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**PhD THESIS**

**THE CRIMINAL DIMENSION OF THE  
EUROPEAN UNION SPACE OF JUSTICE**

**- SUMMARY -**

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The elaboration of this thesis took into account the EU Treaties and international treaties, legal acts of the European Union, the case law of the Court of Justice of the European Union, the European Court of Human Rights and national courts, official documents of European Union institutions, bodies, offices and agencies, the national legislation of the Member States of the European Union, but also of some third countries (USA), as well as the legal doctrine, prior to June 29, 2020.

## ACRONYMS and ABBREVIATIONS

AFCOS	- Anti-Fraud Coordination Service;
AFSJ	- Area of Freedom, Security and Justice;
<i>apud.</i>	- after;
CAP	- Common Agricultural Policy;
CCBE	- Council of Bars and Legal Societies of Europe;
CFSP	- Common Foreign and Security Policy;
CISA	- Convention on the Implementation of the Schengen Acquis;
CJEU	- Court of Justice of the European Union;
COD	- Codecision procedure/Ordinary legislative procedure;
COM	- European Commission;
CPT	- European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;
DNA	- National Anticorruption Directorate;
EAW	- European Arrest Warrant;
ECHR	- European Court of Human Rights;
ECPHRFF	- European Convention for the Protection of Human Rights and Fundamental Freedoms;
eg	- <i>exempli gratia</i> , for example;
EIO	- European Investigation Order;
EPOC	- European Production Order Certificate;
EPOC-PR	- European Preservation Order Certificate;
EPPO	- European Public Prosecutor's Office;
<i>et al.</i>	- and others;
<i>et seq.</i>	- and next;
etc.	- and the following;
EU	- European Union;
EUROJUST	- European Union Agency for Criminal Justice Cooperation;
EUROPOL	- European Union Agency for Law Enforcement Cooperation;
FCO	- Freezing and Confiscation Order;
GATT	- General Agreement on Tariffs and Trade;
GmbH	- Gesellschaft mit beschränkter Haftung (Limited Liability Corporation)
<i>Ibid.</i>	- <i>Ibidem</i> , in the same place;
IOBA	- Institutions, Bodies, Offices and Agencies;
ie	- <i>id est</i> , so is;
JHA	- Justice and Internal Affairs;
JIT	- Joint Investigation Team;
NJECL	- New Journal of European Criminal Law;
NV	- Naamloze vennootschap (Limited Liability Corporation, LLC);
OJ	- Official journal of the European Union;
OJ C	- Official Journal of the European Union, Information and Notices;
OJ L	- Official Journal of the European Union, Legislation;
OLAF	- European Anti-Fraud Office;
<i>op. cit.</i>	- <i>opus citatum</i> , the work cited;
OTP	- Office of the Prosecutor;
p.	- page;
PhD	- Philosophy Doctor;
PIF	- Protection des intérêts financiers (protection of the financial interests);

SEPA	- The Single Euro Payments Area;
TEU	- Treaty on European Union;
TFEU	- Treaty on the Functioning of the European Union;
UCEA	- The Uniform Criminal Extradition Act;
UCLAF	- Anti-Fraud Coordination Unit;
UERA	- The Uniform Extradition and Rendition Act;
UN	- United Nations;
v.	- versus;
VAT	- value added tax;
WTO	- World Trade Organisation.

## I. THE THESIS PLAN

This thesis is structured in 8 chapters, preceded by "*Preliminary Aspects*", each chapter being divided into sections, paragraphs and subparagraphs. Next, we will present the thesis plan, in summary, omitting the subparagraphs, as follows:

### CHAPTER I. INTRODUCTIVE CONSIDERATIONS

*Section I. Legal spaces – EU space of justice and its criminal dimension*

*Section II. Principles and paradigms for the adoption and application of legal acts in criminal matters*

*Section III. Criminal dimension of the EU financial interest's protection*

1. 1957-1992, from Rome to Maastricht Treaty
2. 1992-2007, from Maastricht to Lisbon Treaty
3. 2007 to present, post-Lisbon

### CHAPTER II. THE VALENCES OF THE CONCEPT OF SPACE

*Section I. Geographical, social, political and legal space*

1. Space and territory – geographical concepts in international law
2. Social space and political geography
3. Legal space and justice space

*Section II. Legal space as a topological space*

*Section III. Conclusions*

### CHAPTER III. THE EU JUSTICE SPACE - ITS CRIMINAL DIMENSION

*Section I. The criminal dimension of EU justice space - Area of Liberty, Security and Justice*

1. Geographical spatiality and its influences on the space of justice
2. Ensuring free access to justice in the European Union
3. Attribution, subsidiarity and proportionality - principles of the EU space of justice
4. The Effectivity Principle
5. Achieving the EU goals through the space of justice
6. Human rights in the EU space of justice
7. Courts independence and the public prosecutor's offices autonomy in EU Member States

*Section II. Integration methods applied in the framework of EU criminal dimension*

1. Mutual Recognition of judgments and judicial decisions
2. Establishment of minimum rules concerning the definition of criminal offences and sanctions
3. Enhanced judicial cooperation in criminal matters through Eurojust, Europol and the Schengen acquis mechanisms

### *Section III. Conclusions*

## CHAPTER IV. THE PROBLEM OF EU INTERVENTION IN THE MEMBER STATES CRIMINAL LAW

### *Section I. The EU criminal policy*

### *Section II. The principles of Member States substantial criminal law harmonisation*

1. Principle of the legitimate purpose of criminalisation
2. Legality principle
3. Proportionality principle
4. *Mens rea* principle or *Nulla poena sine culpa*

### *Section III. Harmonisation competence of the EU Member States substantive criminal law*

### *Section IV. Structural paradigm of European Union legal acts laying down minimum rules on the definition of offenses and sanctions*

### *Section V. Conclusions*

## CHAPTER V. THE MUTUAL RECOGNITION PRINCIPLE IN THE CRIMINAL DIMENSION OF THE EU JUSTICE SPACE

### *Section I. Introductory aspects*

### *Section II. Elements of the European Union's criminal policy in the area of criminal procedure*

### *Section III. Mutual trust and its jurisprudential landmarks*

### *Section IV. Structural paradigm of Union legal acts adopting rules and establishing procedures to ensure the application of the principle of mutual recognition in criminal matters*

1. Object of recognition
2. Limits of recognition
3. Scope. The condition of double criminality
4. Object of the measure subject to recognition
5. The issuing authority and the executing authority of the warrant or order subject to recognition
6. Content and form of the warrant or order subject to recognition
7. Other conditions and guarantees for the warrant or order to be mutually recognised and enforceable
8. Transmission of the warrant or order subject to recognition
9. Recognition of the warrant or order
10. Reasons for non-recognition and non-execution of the warrant or order
11. Deadlines for recognition / execution of the warrant or order
12. Remedies in the context of the application of the principle of mutual recognition of judicial decisions in criminal matters
13. Plurality of requests for recognition and enforcement of a criminal judicial decision

### *Section V. Conclusions*

## CHAPTER VI. EUROPEAN UNION LAW ON THE PROTECTION OF ITS FINANCIAL INTERESTS

### *Section I. Administrative investigations and criminal investigations*

1. Administrative law and the "*criminal charge*"
2. Irregularities, administrative measures and penalties
3. Administrative investigations and the role of the European Anti-Fraud Office (OLAF)

*Section II. Developments in substantive criminal law in the area of the Union's financial interest's protection - Directive (EU) 2017/1971*

1. Offences against the financial interests of the European Union set out in the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests (PIF Convention) and its three protocols
2. Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law – genesis and content

*Section III. Conclusions*

CHAPTER VII. THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE AND ITS INVOLVEMENT IN THE CRIMINAL DIMENSION OF THE EUROPEAN UNION'S JUSTICE SPACE

*Section I. Short history*

1. Corpus Juris
2. Communication from the Commission COM (2000) 608 "*The criminal protection of the Community's financial interests: an European Prosecutor*" – the first stage of consolidating the concept of the European Public Prosecutor's Office
3. Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor – deepening the issue of setting up and functioning of the European Public Prosecutor's Office
4. Commission Proposal for a Council Regulation on the Establishment of the European Public Prosecutor's Office, COM (2013) 534 and its evolution

*Section II. European Public Prosecutor's Office according to Council Regulation (EU) 2017/1939*

1. Purpose, principles and organisational model of the European Public Prosecutor's Office
2. Independence of the European Public Prosecutor's Office
3. Legality, opportunity principle and prosecutorial discretion of the European Public Prosecutor's Office
4. Internal rules of procedure, general guidelines and decisions on strategic matters
5. European Public Prosecutor's Office investigations – Investigation measures and other measures

6. Cross-border investigations and judicial cooperation in criminal matters of the European Public Prosecutor's Office. The principle of free movement of evidence
7. Judicial review of the EPPO acts

*Section III. Comparative analysis of the prosecutor's office in international and supranational courts. Office of the Prosecutor of the International Criminal Court and the European Public Prosecutor's Office*

*Section IV. Conclusions*

## CHAPTER VIII. GENERAL CONCLUSIONS AND DE LEGE FERENDA PROPOSALS

*Section I. General conclusions*

*Section II. De lege ferenda proposals*

### BIBLIOGRAPHY

## II. PROBLEMS RESEARCHED IN THE THESIS

Through this doctoral thesis we analysed the criminal dimension of the justice space of the European Union, both in terms of its existence and significance, and in terms of identifying, defining, describing and interpreting the concepts, principles, paradigms and mechanisms that characterises it.

With the entry into force of the Maastricht Treaty and the establishment of the European Union, its competence in the field of judicial cooperation in criminal matters has emerged for the first time under the third pillar (justice and home affairs). The Amsterdam Treaty established that “*the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice*”<sup>1</sup> and the Treaty of Lisbon stated that “*The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime*”<sup>2</sup>.

The space of justice is a subspace of the area of freedom, security and justice, which, however, does not benefit from a formal definition in the Treaties. Both the area of freedom, security and justice (hereinafter AFSJ) and the space of justice of the Union are treated in this doctoral thesis both as geographical spaces and as topological spaces, operating simultaneously the differentiations, but also the conceptual overlaps between the legal space and the justice space.

It is essential to mention in this context that we use primarily in this thesis the concept of “*space of justice*” instead of “*area of justice*”, such as it is the official English terminology in the Treaties. We chose to do so because in the majority of linguistic

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<sup>1</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, adopted at 1.05.1999, OJ C 340, 10.11.1999, art. K1, first paragraph.

<sup>2</sup> Treaty on European Union, consolidated version, OJ C 202, 7.6.2016, art. 3 paragraph 2.

variants of the Treaties the reference is clearly made to a "space of liberty, security and justice" implying logically a "space of justice"<sup>3</sup>. Also, the concept of "space" is a lot more specific and reveals more refined legal and scientific aspects in the general theory of state and justice, legal philosophy, anthropology, topology etc. This thesis approach is a holistic and integrative one, fact that determined us to consider using, even in English, the "space" terminology instead of the "area" one.

EU has created its own legal system which became an integral part of the legal system of the Member States and which their courts are bound to apply<sup>4</sup>. The existing legal order on a transnational territory (that of the European Union) applied by the judicial authorities of the Member States and by the Court of Justice of the European Union makes up the Union's space of justice. Its criminal dimension refers to the aspects of substantive criminal law and criminal procedure that the legal order of the Union establishes in relation to the national law of the Member States.

Another perspective, taken into account in the research, is that of the existence or non-existence of a European Union criminal law (or European criminal law), *latissimo sensu*, containing both the substantive criminal law and the criminal procedural law of the Member States through the intervention operated at the level of the national legal systems by the legal acts of the Union. From the studies we have carried out it resulted that it is not possible to establish, in a rigorously scientific manner, the existence of a criminal law of the European Union, although the notion is, more and more frequently, used<sup>5</sup>. We believe that the use of this concept is, rather, the result of an abstraction of the notion of the EU space of justice criminal dimension, operated in a synthetic manner. This idea often arises during the thesis in the framework of the detailed analysis of the Union's regulatory competence in criminal matters, strictly limited to the adoption of minimum rules on offenses and sanctions and to the facilitation of the application of mutual recognition of judgments and judicial decisions in criminal matters, under the conditions laid down in the Treaties.

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<sup>3</sup> TEU and TFEU linguistic variants in Dutch, German, French, Italian, Portuguese, Spanish, Romanian etc.

<sup>4</sup> CJEU, *Flaminio Costa v. ENEL*, 6/64, EU:C:1964:66, paragraph "On the submission that the court was obliged to apply the national law".

<sup>5</sup> The concept of European criminal law is used, amongst others, by: **Kai Ambos**, *European Criminal Law*, Cambridge University Press, 2018; **Ester Herlin-Karnell**, *The Constitutional Dimension of European Criminal Law*, Hart Publishing, Oxford and Portland, Oregon, 2012; **André Klip**, *European Criminal Law. An integrative Approach*, 3<sup>rd</sup> edition, Ius Communitatis Series, Volume 2, Intersentia, Cambridge-Antwerp-Portland, 2016; **Gert Vermeulen** (Ed.), *Essential Texts on International and European Criminal Law*, 9<sup>th</sup> Revised Edition, Maklu, 2017. The concept of „EU criminal law” is used, amongst others, by: **Chloé Brière**, **Anne Weyembergh**, Editors, *The Needed Balances in EU Criminal Law. Past, Present and Future*, Hart Publishing, Oxford and Portland, Oregon, 2018; **Paul Craig**, **Gráinne de Búrca**, *Dreptul Uniunii Europene. Comentarii, jurisprudență și doctrină*, Editura Hamangiu, București, 2017; **Geneviève Giudicelli-Delage**, **Christine Lazerges**, *Le droit pénal de l'Union européenne au lendemain du Traité de Lisbonne*, Société de législation comparée, Unité mixte de recherche de droit comparé de Paris (Université de Paris I / CNRS UMR 8103), 2012; **Valsamis Mitsilegas**, *EU Criminal Law after Lisbon. Rights, Trust and Transformation of Justice in Europe*, Hart Studies in European Criminal Law, Hart Publishing, Oxford and Portland, Oregon, 2016. Others authors use only the reference to the judicial cooperation in criminal matters; among these: **Marc Blanquet**, *Droit général de l'Union Européenne*, 11e édition, Sirey, Édition Dalloz, Paris, 2018, p. 887; **Marianne Dony**, *Droit de l'Union Européenne*, Septième édition revue et augmentée, Édition de L'Université de Bruxelles, 2018, p. 476; **Augustin Fuerea**, *Manualul Uniunii Europene*, ediția a VI-a, revăzută și adăugită, Editura Universul Juridic, București, 2016, p. 336. Another prominent author refers only to the simple concept of "criminal law", even in the context of the European Union: **Steve Peers**, *EU Justice and Home Affairs Law, Volume II: EU Criminal Law, Policing and Civil Law*, Fourth Edition, Oxford University Press, 2016, p. 57, 161.

At present, the rules of substantive and procedural criminal law in Union legal acts are nothing more than a minimal form, which prefigures a limited sequence of Member States' national law. It comprises several legal principles and rules, most of which are integrated into the legal system of each Member State, through the transposition of framework decisions and directives, while only an absolute minority are directly applicable rules (regulations<sup>6</sup>, very few in this matter). We therefore appreciate that the Member States have a wide margin of appreciation in the process of integrating these rules into national law.

The space of justice of the European Union, in its criminal dimension, is predominantly national, with the notable exception of the European Public Prosecutor's Office, part of this space, a Union body, established on the basis of enhanced cooperation between 22 Member States. The establishment of the EPPO is certainly a real paradigm shift from that of judicial cooperation in criminal matters, based upon a model of sole horizontal integration, to the establishment of a Union judicial authority that has jurisdiction over criminal investigation and prosecution of persons accused of having committed offenses against the financial interests of the European Union. We consider the EPPO to be an essential first step towards a much wider integration of the Union's judicial area in its criminal dimension. This is also the reason why, in the doctoral thesis, we have allocated an important space and we have given special importance to the problem of combating fraud against the financial interests of the Union and the establishment of EPPO.

### **III. IMPORTANCE, USEFULNESS AND CONTEMPORANEOUSNESS OF THE SCIENTIFIC RESEARCH**

The criminal dimension of the EU space of justice is an important issue in Union law, both because of its late emergence from the perspective of coherent regulation (Lisbon Treaty, 2007) and, in particular, because of the present and future of the field.

We consider that, at this stage, the EU is, from the point of view of the stated context, looking for a balance between the defence of its own interests through criminal law and of those of the Member States. Throughout the short and recent history of the field studied, the Union's competence to adopt the relevant legal acts started with the unanimity rule (specific to the third pillar of the Union, justice and home affairs) and reached the ordinary legislative procedure (except for the EPPO). Post-Lisbon, the legal traditions and fundamental values of the Member States criminal justice systems constitute limits to the criminal dimension of the Union's space of justice, benefiting from specific protection, both substantial and procedural. A relevant example in this respect is the so-called "*emergency brake*" and the possibility of enhanced cooperation, in the context of art. 82 para. (3), art. 83 para. (3) and art. 86 para. (1) TFEU.

The coherence of the criminal dimension of the space of justice of the European Union is generated, however, by the conformity of the legal systems of the Member States to the values of the Union, set out by art. 2 TEU: human dignity, freedom, democracy, the rule of law and respect for human rights, including those of minorities.

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<sup>6</sup> Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders, OJ L 303, 28.11.2018 and Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('*the EPPO*'), OJ L 283, 31.10.2017.

Criminal law is the first and probably the most important instrument for guaranteeing and enforcing human rights and fundamental freedoms, provided that, in turn, it satisfies the standards of their observance. The criminal dimension is therefore an axis of the balance established by Union law between the security and human vocation of the AFSJ, between the identity values that legitimise the purpose of criminal offenses and sanctions in the criminal law of the Member States and the utilitarian side of the need to ensure the effectiveness of Union policies.

The constructive paradigm of the European Union's space of justice, in its criminal dimension, assigns as base the mutual recognition of judgments and judicial decisions. In order for that principle to operate in optimal conditions, it is necessary to harmonise by minimum rules some elements of the criminal procedure of the Member States, flexibly identified in art. 82 para. (2) TFEU. These include the rights of victims of crime and the rights of persons in criminal proceedings, ie the human vocation of the criminal dimension of the Union's area of justice, to which we referred earlier. The security vocation is achieved, mainly, through the harmonisation by minimum rules of the definition of crimes and sanctions, set out in art. 83 para. (1) TFEU, and the approximation of laws of the Member States in criminal matters, which are indispensable for the effective implementation of a Union policy in an area which has previously been subject of harmonisation measures, set out by art. 83 para. (2) TFEU.

The doctoral thesis consists of a detailed radiograph of the subject, based on information held until June 29, 2020, seen from a historical perspective and with a projection into the future, by following current trends in the field.

The purpose of this thesis is to reflect in depth on the role of criminal law and criminal procedure in the overall legal order of the European Union and on the balance between the common interests of the Member States and their individual ones, as an object of protection by criminal law.

In the projective vision of the criminal dimension of the EU justice space, we identified critical aspects of the researched topic, from those belonging to the general law of the Union to the details and nuances of legal acts adopted in the researched field, which is why we formulated many *de lege ferenda* proposals.

We believe that, through the perspectives it opens up to a deeper understanding of the criminal dimension of the European Union's judiciary, the thesis is of marked utility for criminal law professionals, especially for those directly involved in the field: judges, prosecutors, lawyers, national and European Union experts, legal staff from the departments of the Ministries of Justice of the Member States, their parliaments and governments, with a view to identifying, defining, interpreting, correctly and fully applying concepts, rules, principles, paradigms and mechanisms by which EU law produces effects both in the legal order of the Member States and, increasingly, in the legal order of the Union, as a subject of international law, with a distinct legal personality from that of the Member States<sup>7</sup>.

The conceptual and doctrinal delimitations operated, accompanied by extensive comments based on the relevant jurisprudence of the Court of Justice of the European Union, but also of the European Court of Human Rights, favour access to a superior understanding of a sophisticated and subtle subject matter, constituting a true guide for theorists and practitioners alike.

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<sup>7</sup> **Augustin Fuerea**, *Dreptul Uniunii Europene – principii, acțiuni, libertăți*, Universul Juridic, București, 2016, p. 19-22.

## IV. OBJECTIVES OF THE THESIS

A major preoccupation that we had, during the elaboration of the doctoral thesis, was the identification, definition and presentation of the concepts, principles, paradigms and mechanisms specific to the criminal dimension of the EU space of justice.

### 1. Identification and definition of concepts

In this context, we identified and defined the concepts of geographical, social, political and legal space, the relationship between space and territory and that between the legal space and the justice space. We analysed the notion of the European Union's area of justice, seen as a legal space, from a topological perspective, defining distances between the components of the space, with direct relevance from the point of view of analysing the approximation of the substantive criminal law rules of the Member States. We addressed the nexus between the justice space of the European Union, in its criminal dimension, and its Area of freedom, security and justice, following the territorial aspects of the legal space, the AFSJ from the perspective of shared competence between the Union and the Member States achieving the Union's goals, guaranteeing and respecting fundamental rights, the independence of the judiciary and the autonomy of prosecutors.

### 2. Determination of the principles applicable in the criminal dimension of the EU space of justice

From this perspective, we identified and analysed the content of the principles applicable in the EU space of justice criminal dimension, classifying them into three separate categories, namely: principles derived from EU law, those specific to criminal law and those of criminal procedure.

In the first category we dealt with the principle of subsidiarity, proportionality, mutual recognition, mutual trust, effectiveness, deterrence, proportionality and *ultima ratio* of criminal law, as well as the principle of direct judicial cooperation in criminal matters in the EU.

Specific to the substantive criminal law, we considered the following: the principle of the legitimate purpose of criminalisation and punishment, the principle of legality (from the perspective of legality of crimes and punishments, certainty and predictability of criminal rules, *lex certa* and non-retroactivity of criminal law / retroactivity of more lenient criminal law, *lex mitior*), the principle of proportionality of crimes and punishments and the principle of *mens rea* in committing the offence (*nulla poena sine culpa*).

From the category of criminal procedural principles found in the criminal dimension of the Union's space of justice, we referred to: the principle of procedural legality, the principles of determining jurisdiction, the mutual recognition of judgments and judicial decisions, assimilation, mutual trust, *ne bis in idem*, respect for human rights and fundamental freedoms in criminal justice, the principle of proportionality from the perspective of the relationship between an invasive procedural measure and its legitimate purpose and the principle of judicial control over procedural acts.

### **3. Definition and delimitation of the Union's powers to adopt legal acts belonging to the criminal dimension of the EU space of justice**

The autonomous and auxiliary competence to lay down minimum rules on the definition of offenses and sanctions, the appraisal of the existence or disappearance, post-Lisbon, of the implicit<sup>8</sup> (residual<sup>9</sup>) competence of the Union, which has been established by the jurisprudence of the CJEU, in the framework of the first (community) pillar of Maastricht, there were as many concerns materialised in the thesis. We have concluded that, by the entry into force of the Treaty of Lisbon, the implicit (residual) competence of the Union to establish minimum rules on offenses and sanctions was fully absorbed by the explicit auxiliary competence set out in art. 83 para. (2) TFEU.

### **4. Identification and description of the Union's legal acts paradigms on the adoption of minimum rules on the definition of offenses and penalties**

In order to identify and exemplify the constructive paradigm of legal acts laying down minimum rules on substantive criminal law, we have taken into account a significant number of framework decisions adopted prior to the entry into force of the Lisbon Treaty and subsequent directives. The priority criminal domains that we had in mind fall both into the autonomous typology set out in art. 83 para. (1) TFEU (terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, corruption, counterfeiting of means of payment, cybercrime and organised crime), as well as in the auxiliary, utilitarian typology, set out in art. 83 para. (2) TFEU (market abuse and offenses against the financial interests of the EU).

In addition to these criminal areas, which are also regulated post-Lisbon, we have also taken into account the minimum rules on offenses set out in framework decisions, in matters that no longer allow for autonomous harmonisation (but only for the auxiliary one, where its conditions are met). These are the minimum rules for defining the offenses and sanctions set out in the Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law<sup>10</sup>, criminal field that is not on the list of criminal typologies that allow autonomous harmonisation by minimum rules, despite the fact that the protection of the rights of persons belonging to minorities is a value of the European Union and non-discrimination and tolerance must characterise the European society, according to art. 2 TEU.

Therefore, we propose, from this stage, *de lege ferenda*, the amendment of art. 83 para. (2) TFEU, to include racism, anti-Semitism, xenophobia, discrimination, incitement to hatred and hate speech, based on membership of a national minority, ethnic or social origin, colour, sexual orientation, gender and disability on the list of 'Eurocrimes'. We have taken into account, in this enumeration, those identity characteristics of the person that cannot be changed by her will.

Other acts used in the analysis of the structural paradigm are Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of

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<sup>8</sup> Perrine Simon, *La compétence d'incrimination de l'Union européenne*, Collection droit de l'Union européenne, Édition Bruylant, Bruxelles, 2019, p. 169 *et seq.*

<sup>9</sup> André Klip, *European Criminal Law. An integrative Approach*, *op. cit.*, p. 185.

<sup>10</sup> OJ L 328, 6.12.2008.

the environment through criminal law<sup>11</sup> and Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution<sup>12</sup>. Neither crimes against the environment and the climate change belong to the list set out in art. 83 para. (1) TFEU, which allows for autonomous harmonisation. That Directive was adopted on the basis of the Union's implicit (residual) competence to harmonise offenses and penalties, which has disappeared in the Lisbon Treaty.

## **5. Identification and description of the constructive paradigm of Union legal acts on the application of mutual recognition**

Although we have taken into account all these legal acts, we have analysed the paradigm identified from the perspective of three key legal mechanisms based on the principle of mutual recognition of judgments and judicial decisions: the European arrest warrant<sup>13</sup>, the European investigation order<sup>14</sup>, the freezing orders and confiscation orders<sup>15</sup>.

## **6. Identification and presentation of the elements and sources of the European Union's criminal policy**

Although we do not support the concept of criminal law of the European Union, we consider that the Union has its own criminal policy, both in the substantive and in the procedural field. The doctoral thesis addresses the issue of the Union's criminal policy from a practical perspective, based upon the conclusions of the European Councils, the Union's programs for their implementation, the Commission communications on the measures to be taken to implement this policy and other programmatic documents, but also from an academic perspective, mainly represented by the Manifesto for a European Criminal Policy (*Manifesto I*)<sup>16</sup>, published in 2009 by a group of prestigious representatives of the European academic environment, revised and completed in 2011 and by the Manifesto on European Criminal Procedure Law (*Manifesto II*)<sup>17</sup>, published in 2013, also by the same group of university professors (with some exceptions).

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<sup>11</sup> OJ L 328, 6.12.2008

<sup>12</sup> OJ L 255, 30.9.2005.

<sup>13</sup> Council Framework Decision 2002/584/ JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002.

<sup>14</sup> Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 1.5.2014.

<sup>15</sup> Regulation (EU) 2018/1805, *op. cit.*, note 6.

<sup>16</sup> **Petter Asp, Nikolaos Bitzilekis, Sergiu Bogdan, Thoman Elholm, Luigi Foffani, Dan Frände, Helmut Fuchs, Maria Kaiafa-Gbandi, Jocelyne Leblois-Happe, Adam Nieto-Martín, Cornelius Prittwitz, Helmut Satzger, Elisavet Symenidou-Kastanidou, Ingeborg Zerbes**, *European Criminal Policy Initiative, Manifest for a European Criminal Policy*, *Zeitschrift für Internationale Strafrechtsdogmatik* no. 12/2009.

<sup>17</sup> **Petter Asp, Nikolaos Bitzilekis, Sergiu Bogdan, Thoman Elholm, Luigi Foffani, Dan Frände, Helmut Fuchs, Maria Kaiafa-Gbandi, Jocelyne Leblois-Happe, Adam Nieto-Martín, Cornelius Prittwitz, Helmut Satzger, Elisavet Symenidou-Kastanidou, Ingeborg Zerbes, Frank Zimmermann**, *European Criminal Policy Initiative, A Manifesto on European Criminal Procedure Law*, *Zeitschrift für Internationale Strafrechtsdogmatik* no. 11/2013.

## 7. Definition and presentation of the criminal dimension of the mechanisms for the protection of the European Union's financial interests and the European Public Prosecutor's Office

This objective of the doctoral thesis is particularly important because criminal law intended to protect the financial interests of the European Union is a *sui generis* form of national criminal law, which has the legitimate purpose of criminalising and punishing the protection of supranational interests, indigenised by the autonomous nature of the Union's legal order. On the other hand, we have started the doctoral research for this thesis just at the height of the effervescence determined in the Union and in the Member States by the finalisation of the PIF Directive and the adoption, through enhanced cooperation, of the EPPO Regulation<sup>18</sup>.

We have analysed and presented the entire field of the criminal protection of EU's financial interests, including the issue of the European Public Prosecutor's Office, in the historical evolution of ideas, initiatives, legal acts, doctrine and jurisprudence of the CJEU, with the launching of hypotheses on the EPPO's functioning which, at the ending of the doctoral research, presented many unknown aspects, especially due to the absence of EPPO's internal rules of procedure, having a special theoretical and practical importance in the vision of the EPPO Regulation.

## V. RESEARCH METHODS

In the scientific research activity dedicated to the elaboration of the doctoral thesis we have used a plurality of methods, in complementary relations, methods that allowed us a holistic approach to the issue.

1. **The historical method**, as a set of epistemological means dedicated to the research of concepts, principles, paradigms and legal mechanisms from the perspective of their succession over time, has allowed us to correctly place the criminal dimension of the European Union's evolving space of justice, from its first precursors (set out in the Maastricht Treaty), the formalisation of the AFSJ (in the Amsterdam Treaty), the proclamation of the Charter of Fundamental Rights of the European Union (Nice European Council, 7-10 December 2000) until the current regulations (developed after the entry into force of the Lisbon Treaty).

The relevant policy of the European Union (including the criminal policy) has also been pursued from a historical perspective, the most important moments being marked by:

- Brussels European Council, 5-6 December 1977 - Mr. Valéry Giscard d'Estaing, President of the French Republic, historic speech of 6 December 1977 on the need to create a "*European judicial space*";
- Vienna European Council, 11-12 December 1998 - "*Vienna Strategy for Europe*" - implementation of the Action Plan for an Area of Freedom, Security and Justice; the improvement of European citizens' access to justice<sup>19</sup>;
- Tampere European Council, 15-16 October 1999 - "*Towards a Union of Freedom, Security and Justice: the Tampere Milestones*"; the document established the principle of mutual recognition of judgments and judicial decisions as "*the*

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<sup>18</sup> Regulation (EU) 2017/1939, *op. cit.*, note 6.

<sup>19</sup> Vienna European Council, 11-12 December 1998, Presidency Conclusion, chapter X.

cornerstone of judicial cooperation in both civil and criminal matters in the Union"<sup>20</sup> and set out the principle of the European arrest warrant<sup>21</sup>;

- Brussels European Council, 4-5 November 2004, The Hague Programme "Strengthening freedom, security and justice in the European Union"<sup>22</sup> – the strengthening of justice, in particular by increasing mutual trust, judicial cooperation in criminal matters, police and operational cooperation, strengthening the role of Eurojust and Europol, mutual recognition and approximation of laws by minimum rules<sup>23</sup>;
- Brussels European Council, 10-11 December 2009, Stockholm Programme "An open and secure Europe serving and protecting citizens"<sup>24</sup> - the Union's most ambitious and comprehensive program in the field of justice.

We also followed, in the content of the thesis, several important historical stages in the field of the establishment of the European Public Prosecutor's Office, from the emergence of the idea until the adoption of Regulation (EU) 2017/1939:

- "Corpus Juris: introducing criminal provisions for the purpose of the financial interests of the European Union" (2000)<sup>25</sup>;
- Communication from the Commission COM (2000) 608 "The criminal protection of the Community's financial interests: a European Prosecutor";
- Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor<sup>26</sup>.

2. **The geographical method**, having legal impact - based on legal geography and on the analysis of the justice space as a subspace of the AFSJ, directly related to the territory. We have used this method to analyse the "variable geometry"<sup>27</sup> (according to some authors) or the "variable geography"<sup>28</sup> (according to other authors) of the justice space, from the point of view of its territorial flexibility, taking into account the particularities of the legal regime applicable in this field to the Kingdom of Denmark, the United Kingdom of Great Britain and Northern Ireland and the Republic of Ireland. Even if before the ending of this thesis the United Kingdom ceased to be a Member State of the European Union (on 31 January 2020), the legal "opt-out / opt-in" regime it enjoys in

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<sup>20</sup> Tampere European Council, 15-16 October 1999, Presidency Conclusions, section B, subsection VI, §. 33.

<sup>21</sup> *Ibid.*, §. 35.

<sup>22</sup> OJ C 53, 3.3.2005.

<sup>23</sup> *Ibid.*, paragraph III.3.

<sup>24</sup> OJ C 115, 4.5.2010.

<sup>25</sup> Asociația Română de Cercetare a Dreptului Comunitar, *Corpus Juris . Dispoziții penale privind protecția intereselor financiare ale Uniunii Europene*, ediție bilingvă română/franceză, Editura Efemerida, București, 2000. The *Corpus Juris* was developed at the request of the European Parliament, by a group of university professors led by **Mireille Delmas-Marty**, from the University of Panthéon-Sorbonne and which included university professors: **John AE Vervaele**, **Enrique Bacigalupo**, **Giovanni Grasso**, **Klaus Tiedemann**, **Niels Jareborg**, **Dyonysios Spinelis**, **Cristine van der Wyngaert** and **John R. Spencer** - hereinafter, the citations referring to this work will be: *Corpus Juris*.

<sup>26</sup> COM (2001) 715.

<sup>27</sup> **André Klip**, *European Criminal Law. An integrative Approach*, op. cit, p. 61; **Valsamis Mitsilegas**, *EU Criminal Law, Modern Studies in Criminal Law*, Hart Publishing Ltd., Oxford and Portland, Oregon, 2009, p. 44.

<sup>28</sup> **Marie Garcia**, **Simon Labayle**, **Clémentine Mazile**, **Marjolaine Roccati**, coordonateurs, *L'Espace de liberté, sécurité et justice: un droit à géographie variable?*, in the framework of the doctoral session organised in Lyon, 14-15 June 2012 by Réseau universitaire européen dédié à l'étude de l'Espace de liberté, sécurité et justice, under the title: „La fragmentation de l'Espace de liberté, sécurité et justice: questions de géographie et de géométrie”, online at <http://www.gdr-elsj.eu/wp-content/uploads/2012/09/WP2-GDR-ELSJ-Atelier-ELSJ-Lyon-juin-2012-version-finale.pdf>.

relation to the AFSJ was analysed due to the ingenuity of the identified solutions, especially because of the need to maintain a prestigious and long constitutional and legal tradition (more than 800 years).

**3. The mathematical method** – We have used in this thesis the mathematical modelling of several principles and legal phenomena specific to the European Union's space of justice in its criminal dimension, as a result of interpreting this space in a topological sense, assuming a set on which an order was established. Thus, we used the 'chi-square distance' to measure the harmonisation distance between Member States' domestic laws transposing the framework decisions and directives laying down minimum rules for defining offenses and sanctions and the Union's legal acts standards. The same method was used also for assessing the seriousness of a crime, by aggregating several distinct criteria, in order to apply the principle of proportionality of offenses and penalties.

**4. The systematic and teleological method** - is the projection in the field of legal scientific research of what the CJEU has established as a methodology for interpreting European Union law in the *Cilfit* case: “every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied”<sup>29</sup>. A similar expression appears in the judgment of the Luxembourg Court in *Rosselle*: “in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part”<sup>30</sup>.

The systematic method involves the analysis of the documentation that formed the basis of the research in a holistic manner, taking into account the identified principles and, above all, the hierarchy of legal rules. We have taken into account, in this context, the principle of supremacy enjoyed by Union law within the legal order of each Member State, the freedoms of movement of the Union, as constitutional principles, the need to respect the values established by art. 2 TEU, the relationship between the legal order of the Union and that of public international law.

The systematic method also ensures the coherence of the scientific research results, their coordination and, alongside the logical method, the absence of inner contradictions.

The teleological method involves the use and interpretation of the material studied in the research process from the perspective of certain proposed purposes. Moreover, in the legal field, the teleological method requires the definition of each concept, the enunciation of principles, the establishment of paradigms and the construction of syllogisms according to their purpose. The idea is also partially synthesized by a Latin adage on the interpretation of legal acts: *actus interpretandus est potius ut valeat quam ut pereat*. The teleological method justifies the principle of mutual recognition of judgments and judicial decisions, the establishment of a simplified extradition system that allows the surrender of persons wanted by the judiciary of other Member States for the purpose of criminal investigation, trial or execution of punishment or arrest, the almost complete regrouping of judicial cooperation within the European Union in the form of the European

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<sup>29</sup> CJEU, 6 October 1982, *Srl Cilfit and Lanificio di Gavardo SpA v. Ministry of Health*, 283/81, EU:C:1982:335, paragraph 20.

<sup>30</sup> CJEU, 21 May 2015, *Charlotte Rosselle v. Institut national d'assurance maladie-invalidité (INAMI), Union nationale des mutualités libres (UNM)*, C-65/14, EU:C:2015:339, paragraph 43.

investigation order, the recovery at Union's level of instrumentalities and proceeds of crime by way of the freezing and confiscation orders etc.

**5. Etiological method** - involves researching the issue in terms of economic, social, political, historical and purely legal causes of the concepts, principles, paradigms and phenomena circumscribed to the study. We think that, from a logical point of view, it would have been more appropriate to group the etiological and the teleological method because, in doing so, we could have better highlighted the cause-effect relationship. However, we have structured the methods in this way in order to observe the parallelism between the method of interpreting European Union law highlighted by the CJEU judgment in the *Cilfit* case with the methodology of scientific research in the field. We have used the etiological method in the context of the principle of rendering justice as close as possible to the citizens of the Union, this principle being an adequate response to certain economic and social issues (lack of financial and operational means for remote judicial procedures, but also the social value of the justice). The special legal regime enjoyed by Denmark and the Republic of Ireland in relation to the AFSJ and the special regime created for the United Kingdom for the period in which it was part of the European Union are not only an expression of legal geography, but they come from historical causes and identity, thus having an etiological valence.

**6. The anthropological method** – being closely related to the historical one, this method refers to the understanding of the object of research and its results from the perspective of the human individual and human communities, including the State as an identity expression of belonging to the community. Cultural, social and legal anthropology has a well-defined importance in the research of the justice space of the European Union. Relevant examples in this regard are the provisions of the Treaties which preserve, within the AFSJ, the identity of the different legal systems and legal traditions of the Member States (art. 67 para. (1) TFEU). Likewise, the "*emergency brake*" that Member States may apply to the Council to suspend the procedure for adopting directives in view of harmonisation of substantive criminal law or criminal procedure, in accordance with the provisions of art. 83 para. (3) and, respectively, art. 82 para. (3) TFEU is designed to protect the fundamental aspects of national criminal justice systems. They have a strong identity content and are, to a large extent, the expression of legal anthropology.

Anthropological concepts such as: individualism versus collectivism, tolerance and integration versus intolerance and segregation, racism, xenophobia, discrimination, coercion, alternative methods of dispute resolution etc. are reflected in criminology and victimology and from those into criminal policy and law.

**7. The logical method** - involves the use of correct, deductive and inductive reasoning, the observance of the formal logic rules, the identification of the syllogism's errors present, in some cases, in doctrine and jurisprudence (for example, deduction of the principle *nulla poena sine culpa* from the principle of the presumption of innocence) and the assurance of the logical support for translations.

**8. The linguistic method** - consists in searching for the real meanings of a text by intensively using the grammar and lexicon of the language in which it is written, by exploring the denotative language, and sometimes the connotative one, understanding the

possible legal metaphors used and the creation of new phrases: "*emergency brake*"<sup>31</sup>, "*pseudo-veto*"<sup>32</sup>, "*cornerstone of judicial cooperation*"<sup>33</sup>, "*crimmigration*"<sup>34</sup>, "*non-contamination clause*"<sup>35</sup>, "*gateway clause*"<sup>36</sup>, "*acte claire doctrine*"<sup>37</sup>, "*comitology*"<sup>38</sup>, "*variable geometry*"<sup>39</sup> etc.

Frequently we have found that the different linguistic variants of the Treaties and legal acts of the Union present differences, sometimes important, which can change, in a significant way, the text's meaning. In these situations, we have proceeded to a comparative analysis of a plurality of linguistic variants, mainly those in: English, French, German, Italian, Portuguese, Romanian and Spanish. We then compared the meaning of the text in different languages applying the logical, systematic and teleological method to select the closest significance to reality. In this démarche, we have also identified translation errors, which would require the application of the corrigendum procedure.

This method is also supported by the CJEU judgment in *Cilfit* case, regarding the interpretation of European Union law<sup>40</sup>.

**9. The comparative method** - specific to comparative law<sup>41</sup>, allows the establishment of similarities and differences, common principles and paradigms, but also different views and reasoning between legal systems and legal orders. We used this method in researching the relationship between the EU legal order and that of national and international law, as well as in comparing elements of the legal systems of the Member States and of the EU legal order to those of third countries (eg USA, when analysing by the method of comparative law, the principle of mutual trust<sup>42</sup> and the European arrest warrant<sup>43</sup>). In this context, the analysis by the comparative method of some provisions of the Treaties and legal acts of the Union with those of some global or regional international conventions, in particular those of the UN and the Council of Europe, also played a special role.

Also, in researching the interaction between the EU legal order and the national law of the Member States, we took into account the Constitution of each Member State, the criminal and criminal procedure codes, some special criminal laws and national jurisprudence.

At the thesis final, the European Public Prosecutor's Office was compared with the Office of the Prosecutor of the International Criminal Court (OTP), the former representing the paradigm of the transnational prosecutor's office and the latter that of the international prosecutor's office.

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<sup>31</sup> Paul Craig, Gráinne de Búrca, *op. cit.*, p. 1108.

<sup>32</sup> Steve Peers, *op. cit.*, p. 34.

<sup>33</sup> Tampere European Council Presidency Conclusions, §. 33.

<sup>34</sup> John A.E. Vervaele, *European criminal justice in the European and global context*, New Journal of European Criminal Law, volume 10/2019/01, Sage Publishing, p. 11.

<sup>35</sup> Paul Craig, Gráinne de Búrca, *op. cit.*, p. 388.

<sup>36</sup> Augustin Fuerea, *Manualul Uniunii Europene*, *op. cit.*, p. 325.

<sup>37</sup> Paul Craig, Gráinne de Búrca, *op. cit.*, p. 537; CJEU, Judgment in *Cilfit*, *op. cit.*, paragraph 16.

<sup>38</sup> *Ibid.*, p. 152.

<sup>39</sup> André Klip, *European Criminal Law. An integrative Approach*, *op. cit.*, p. 61; Valsamis Mitsilegas, *op. cit.*, p. 44.

<sup>40</sup> CJEU, Judgment in *Cilfit*, *op. cit.*, paragraph 18.

<sup>41</sup> Considered by some authors as a science – see Nicolae Popa, *Teoria generală a dreptului*, Ediția 5, revizuită și adăugită, Editura C. H. Beck, București, 2014, p. 20.

<sup>42</sup> *Full Faith and Credit Clause*, US Constitution, art. IV Section 1.

<sup>43</sup> *Interstate Extradition Clause*, US Constitution, art. IV Section 2 Paragraph 2.

10. **The philosophical method** - involves the interpretation based on doctrines belonging to the philosophy and general theory of law. We used this method in search of philosophical and doctrinal justifications of the concepts, principles and paradigms identified, believing that all these must present a certain cohesion, coherence, given by conformity with a more general vision, which combines ontological, moral and ethical, epistemological, praxiological and axiological elements. The legal philosophy we have used in this thesis is predominantly that of the European Enlightenment (as invoked also in *Manifesto I*) and the philosophical lines of thought that followed it, until today. We have considered, in this context, that a return to the classics of legal philosophy and general theory of law (such as Charles-Louis de Secondat, Baron de La Brède et de Montesquieu; Jean-Jacques Rousseau; Jeremy Bentham; John Stuart Mill; Alexis Henri Charles de Clérel, viscount of Tocqueville; Paul Johan Anselm Ritter von Feuerbach; Max Weber, Cesare Bonesana di Beccaria; Marquis of Gualdrasco and Villaregio), but also an enhanced attention paid to the contemporary ones, such as J.H.A. Hart, Andrew von Hirsch, Richard Posner and Ronald Dworkin is very appropriate.

## VI. CONCEPTUAL DELIMITATIONS

### 1. The concept of criminal law

The definitions of this concept are pluralistic and they have been explored in this thesis.

We refer, first of all, to substantive criminal law and criminal procedure. Together, they form the criminal law *lato sensu*. Substantive criminal law, ie that area of law which defines offences and punishments (special substantive criminal law) and all the rules applicable to their legal regime (the general part of substantive criminal law) constitutes criminal law *stricto sensu*. From the “*dialogue of the Courts*”, ie the mechanism of interaction between the judgments of CJEU, ECHR and national courts, resulted a first conceptual delimitation, essential to the doctoral research: that between formal substantial criminal law and substantial criminal law by its nature, seen from the procedural perspective of the “*criminal charge*”<sup>44</sup>. Substantial formal criminal law (which we commonly call criminal law) is that set out expressly in criminal law acts. The concept of substantive criminal law by its nature has emerged in the context of ECHR case law on the right to a fair trial, in particular from the Court's judgment in *Engel and Others v. The Netherlands*<sup>45</sup>, but also many other judgments (both of ECHR and CJEU) and involves the assimilation with criminal law of the sanctioning provisions belonging to other branches of law, such as: administrative, financial, disciplinary etc., insofar as the nature of the offence (by its seriousness), the general addressability of the rule and the applicable sanction (by its punitive nature and by its seriousness) are characteristic of the criminal law. The criteria for delimiting this typology of criminal law, deduced by jurisprudence

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<sup>44</sup> ECHR, *Deweere v. Belgium*, 27 February 1980, application 6903/75, CE:ECHR:1980:0227JUD000690375.

<sup>45</sup> ECHR, 8 June 1976, applications no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, CE:ECHR:1976:0608JUD000510071, §. 82 alin. 3; see also **Gheorghe Bocşan**, *Autonomous Concepts of the Case-Law of The European Court of Human Rights and the Court of Justice of The European Union in matters of Disciplinary, Administrative, Financial and Criminal Liability*, Challenges of the Knowledge Society, Bucharest (2019) 482-497.

and called by M. Delmas-Marty "*administrative-criminal law*"<sup>46</sup> we will identify, in the thesis, by the concept of "*Engel Criteria*", used by A. Klip<sup>47</sup>.

The "*Engel Criteria*" constitute the real demarcation between criminal law and other branches of law from the perspective of the criminal dimension of the European Union's space of justice. The only exception to this rule we identified is located in the context of the principle of legality of offenses and punishments, a principle that concerns the formal character of criminal law and not the inner nature of the offences and the sanctions.

## **2. Identity criminal law and auxiliary criminal law**

National criminal law is a product of identity. Its purpose is legitimate whenever the values it defends are the expression of the national community axiology. However, it is true that the Member States of the European Union have in common many identity values that must be protected by criminal law. They come from the European identity or have become European or national through acculturation, in the context of globalization. Therefore, in transferring the issue in the area of criminal regulatory competence, we insist that only Member States can enact criminal law in the formal sense of the term, but, in the context of the criminal dimension of the European Union space of justice, it will no longer be the singular expression of the protection of some identity values or other values acquired through acculturation, but also the instrument of achieving the effectiveness of certain Union's policies. In the latter meaning, part of the national criminal law becomes independent of its identity, purely utilitarian and ancillary to Union's policies. Moreover, the principle of assimilation means that non-identity offences benefit from the same combatting standards at national level as identity offences. This view is originally jurisprudential, stemming from the so-called 'Greek maize' case<sup>48</sup>, before being regulated by the Treaties (Article 83 (2) TFEU).

Auxiliary criminal law is an original creation of the European Union, but derived from the doctrine of implicit powers, created by the jurisprudence of the International Court of Justice<sup>49</sup>. The generic concept is difficult to internalise and, especially, to legitimise. However, given that the only concrete expressions of the Union's auxiliary competence to lay down minimum rules on offences and sanctions, so far, have been manifested only in the field of market abuse and offenses against the financial interests of the European Union, we express the opinion that this competence was created, rather, to legitimise the criminal protection of the financial interests of the Union.

## **3. The space of justice of the European Union - territorial, legal and topological**

In the content of this thesis, we have defined the stated concepts, insisting on the fact that space and territory are not synonymous. As arguments we have brought the interpretations of these notions in public international law, in which the spaces are, rather, areas in which the sovereignty of any state is not exercised, and the territories, on the contrary, belong by their nature, to the states. Spaces, from a topological point of view, are sets of elements (including legal ones, such as legal concepts, rules, legal acts,

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<sup>46</sup> Mireille Delmas-Marty, Cathrine Teitgen-Colly, *Punir sans juger: de la répression administrative au droit administratif pénal*, Economica, Paris, 1992.

<sup>47</sup> André Klip, *European Criminal Law. An Integrative Approach*, *op. cit.*, p. 192.

<sup>48</sup> CJEU, 21 September 1989, *Commission v. The Hellenic Republic*, 68/88, EU:C:1989:339.

<sup>49</sup> Marc Blanquet, *op. cit.*, p. 96.

principles of law etc.) on which an order is established (a legal order, mainly represented of regulated legal relations). Legal spaces are topological spaces, consisting of sets of legal elements, but also territories over which the legal order reigns. The space of justice is the legal space seen from a litigious perspective, ie the set of legal elements, together with the order we referred to above, available to the judicial authorities, in order to settle disputes. The space of justice criminal dimension consists of a selection of criminal law elements or in direct connection with it, extracted from the EU legal order. The concept is dynamic and polymorphic. When we refer to the autonomous legal order of the European Union, we also have in mind its space of justice. Its criminal dimension does not include rules of criminal law or criminal procedure because they belong exclusively to the Member States, but a criminal meta-structure, containing operating algorithms with the rules of criminal law and procedure of the Member States. These algorithms refer to: the principle of mutual recognition of judgments and judicial decisions (mainly in criminal matters, but sometimes also in civil matters, because there are situations in which criminal law or criminal procedure relations ones established, transform themselves or go extinct as a result of elements belonging to other branches of law) and the harmonisation by minimum rules of offences and sanctions, as well as elements of criminal procedure.

#### **4. Harmonisation, approximation of laws, regulations and administrative provisions, minimum rules**

Although they are frequently used in the Treaties, the notions mentioned do not benefit from official definitions (neither by the Treaties or legal acts, nor by the jurisprudence of the CJEU). In this doctoral thesis, we use these concepts in connection with the Area of freedom, security and justice, a context in which they may have particular meanings.

All these concepts are used in the context of the integration phenomenon, assumed by the European Union in a holistic way. Starting from the dictionary definitions of the term 'harmonisation', in various official languages of the Union, we find that harmonisation is a way to achieve integration, that it undoubtedly has a horizontal dimension, possibly allowing coordination and that it involves a process of transformation of the elements of a whole so that they are in agreement, maintaining correct proportions between them and generating consistency of the whole<sup>50</sup>.

We appreciate that all these general features of the concept of harmonisation are also valid in European Union law, both in the context of its use in connection to the internal market and in relation to the Union's area of justice.

Numerous definitions of harmonisation, developed in legal doctrine, support such an interpretation.

Thus, F.M. Tadić defines harmonisation as a “*process of (re)ordering the relationship between diverse elements in accordance with a prefixed standard so as to avoid or eliminate friction*”<sup>51</sup>.

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<sup>50</sup> **Gheorghe Bocșan**, *Armonizarea, apropierea legislațiilor și stabilirea de standarde minime în dreptul Uniunii Europene*, Revista Dreptul, nr. 7/2018, Uniunea Juriștilor din România, București, p. 119. Some of the following explanations have been published in this scientific article, as partial results of doctoral research (p. 117-151).

<sup>51</sup> **F.M. Tadić**, *How Harmonious can Harmonisation be? A theoretical approach towards harmonisation of (criminal) law*, p. 16, in *Harmonisation and harmonisation measures in criminal law*, edited by **André Klip, Harmen van der Wilt**, Koninklijke Nederlandse Akademie van Wetenschappen Verhandelingen, Afd. Letterkunde, Nieuwe Reeks, deel 186, 2002, apud **F. Calderoni**, *Organized Crime Legislation in the*

Defining European integration, A. Klip notes that this means “*the progressive process of bringing European states, European peoples and their societies closer together*”<sup>52</sup>. The author also mentions, in this context, that integration does not necessarily have to be built in a legal form, but harmonisation necessarily implies such a form. Therefore, harmonisation consists in “*the convergence of the legal practice of the various legal systems based upon a common standard*”<sup>53</sup>. The same author makes the distinction between harmonisation and unification, pointing out that harmonisation presupposes the existence of differences between systems, and its purpose is not to eliminate them: “*The elimination of all differences would correspond to the goal of unification*”<sup>54</sup>.

P. Craig and G. de Búrca refer to a negative and positive integration<sup>55</sup>, stating that negative integration is achieved at the level of the European Union by applying the principle of mutual recognition, and positive integration, by “*harmonisation of different national laws, through a Community directive*”<sup>56</sup>. From the reference immediately following the quoted text, namely the one referring to art. 114 and 115 TFEU, we understand that the authors have in fact taken into account the concept of approximation of the laws, regulations and administrative provisions of the Member States. There is no doubt that the authors cited put a sign of equality between harmonisation and the approximation of the laws and regulations of the Member States.

Another author, prof. dr. Werner Schroeder, states in the same vein that: “*The terms “approximation of laws” and “harmonisation” stand for the alignment of national rules with a standard prescribed by Union law*”<sup>57</sup>.

There are thus authors (such as Craig and de Búrca, but also many others<sup>58</sup>) who overlap the two notions. Other authors argue that they remain distinct. Thus, A. Klip, after reiterating the same idea expressed by Craig and Búrca regarding integration, seen as negative integration and positive integration, defines the latter as referring to “*areas in which the Union harmonises the substantive laws in a certain field*”<sup>59</sup>. Although he accepts that the notion of harmonisation often overlaps with the notion of approximation of laws, the author nevertheless makes a difference between these concepts depending on their placement in the context of the internal market or the area of freedom, security and justice of the European Union. The author shows that “*harmonisation is still reserved for the areas of the Union policy that previously belonged to the First pillar*”<sup>60</sup> and the fact that “*harmonisation provides a higher degree of integration and similarity than approximation*”<sup>61</sup>.

In the context of the Union's area of freedom, security and justice, and in particular in the field of judicial cooperation in criminal matters between Member States, A. Klip insists on the difference in terminology in the relevant texts of the TFEU, art. 82 and 83,

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*European Union – Harmonization and Approximation of Criminal Law, National Legislation and the EU Framework Decision on the Fight Against Organized Crime*, Springer Heidelberg, Dordrecht, London, New York, 2010, p. 2.

<sup>52</sup> André Klip, *European Criminal Law. An Integrative Approach*, op. cit, p. 25.

<sup>53</sup> *Idem.*

<sup>54</sup> *Idem.*

<sup>55</sup> Paul Craig, Gráinne de Búrca, op. cit, p. 680.

<sup>56</sup> *Idem.*

<sup>57</sup> Werner Schroeder, *Limits to the European Harmonisation of Criminal Law*, Eucrium, online, at <https://doi.org/10.30709/eucrium-2020-008> .

<sup>58</sup> Perrine Simon, op. cit, p. 105.

<sup>59</sup> André Klip, *European Criminal Law. An Integrative Approach*, op. cit, p. 33.

<sup>60</sup> *Ibid.*, p. 35.

<sup>61</sup> *Idem.*

compared to art. 114 and 115 TFEU, on the approximation of the laws in the internal market, in the first case, the concept of 'minimum rules' being used<sup>62</sup>.

We note, therefore, that the rules in the Treaties relating to the Union's competences in the field of substantive criminal law and the criminal procedure of the Member States emphasize the concept of "minimum rules". However, art. 82 para. (1) TFEU refers to the fact that the approximation of the laws of the Member States is a basis for judicial cooperation in criminal matters within the Union. The reference to this notion is also made within art. 83 para. (2) TFEU, in the context of the Union's ancillary competence in the field of substantive criminal law of the Member States.

On the other hand, the interchangeable character of the concepts of harmonisation and the approximation of laws appears evident in the context of art. 114 TFEU on the establishment and functioning of the internal market. Thus, paragraph 1 of the article uses the second concept mentioned. Paragraph 4, referring to the measures taken pursuant to paragraph 1, expressly refers to them as "*harmonisation measures*". Furthermore, that article is to be found in Title VII of Part Three of the TFEU, entitled 'Common rules on competition, taxation and approximation of laws'.

Harmonisation is not necessarily an institutionally organised process in the European Union. It can also occur spontaneously, for example through the spillover effect, through which the legislation of one or more Member States spreads spontaneously to other Member States than the original ones, because it proves to be more efficient, rational and well-structured or for other reasons. A harmonisation of the criminal systems of the Member States of the European Union has also taken place through the existing human rights protection mechanisms at the Council of Europe level, in particular through the binding nature of the judgments of the European Court of Human Rights, but also within the United Nations (the Human Rights Committee and the Human Rights Council). Harmonisation in the European Union has also occurred through the effect of public international law, through international conventions, which have imposed certain common rules in the most diverse fields, such as the law of the sea, maritime and air transport, international trade, especially through GATT, WTO etc.

Both harmonisation and approximation of laws are methods of achieving integration at European Union level, the former being a predominantly horizontal approach and the latter an approach with a more pronounced vertical component.

Neither harmonisation nor approximation of laws means unification. Unification generates identity between legal systems, as long as harmonisation, but also the approximation of laws, aims to achieve convergent standards, while maintaining the diversity of national systems in terms of means and form.

Approximation of laws is most common in the Treaties, with the phrase "approximation of laws and regulations". However, from the point of view of the criminal dimension of the European Union space of justice, what we consider to be really important is the idea of adopting "minimum rules". This is the key concept used by the Treaties and emphasises the Union's minimal involvement in the criminal law of the Member States, which respects the characteristics of their legal and criminal systems. Legal acts of the Union, adopted in the criminal dimension of the European Union space of justice, often refer only to the term "minimum rules", without specifying whether

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<sup>62</sup> *Ibid.*, p. 34-36.

harmonisation or approximation is achieved by these legal acts. Thus art. 1 of most directives in this field states: "*This Directive establishes minimum rules for (...)*"<sup>63</sup>.

As we have shown above, there is no conceptual certainty at the level of the Treaties that would accurately determine the delimitation between the concepts of harmonisation and, respectively, the approximation of laws or, more precisely, the approximation of laws and regulations. In the area we analyse in this thesis, we will focus on the concept of "*minimum rules*", in particular that of "*minimum rules concerning the definition of offences and sanctions*"<sup>64</sup>, and in connection with this, we will use mainly the term "*harmonisation*".

The preference for "*harmonisation*" also results from the predominant use of this concept, in the context of art. 82, 83 TFEU in legal doctrine, the vast majority of authors using this expression generically, without analysing the detailed differences between harmonisation and approximation of laws<sup>65</sup>. This has become a quasi-absolute rule. As the current language of legal doctrine doesn't reflect this issue, it seems that the differentiation between the two concepts is no longer so important.

## 5. The financial interests of the European Union and the financial interests of the Member States

The legal order of the Union, as set out in the classic judgments of the CJEU in *Van Gend & Loos*<sup>66</sup> and *Costa v. ENEL*<sup>67</sup>, is integrated into the legal order of the Member States, being endowed with its own institutions, legal personality and legal capacity. For the maintenance of institutions, bodies, offices and agencies (hereinafter, IBOA), for the concrete assumption of legal capacity and the manifestation of legal personality, the European Union needs its own budget, distinct from that of the Member States.

The European Union's assets include Member States' contributions and the Union's own revenues (which generally result from a joint exercise of Member States' sovereignty, as is the of customs duties or a certain rate of VAT). The Union's budgetary expenditures also include sums of money intended for Member States, companies, legal persons or individuals, as European funds, for the implementation of the various policies of the Union. Therefore, Member States supply, but also largely consume, the Union budget. There is thus an important intersection between the particular financial interests of the Member States and the financial interests of the European Union. It would therefore be expected that the Member States concern to combat fraud against the financial interests of the Union would be considered as assimilated to the identity values protected by the criminal law of those.

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<sup>63</sup> Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive), OJ L 173, 12.6.2014; Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA, OJ L 123, 10.5.2019 etc.

<sup>64</sup> TFEU, art. 83 paragraph (1).

<sup>65</sup> The examples are overwhelmingly numerous; therefore, we will provide just a few examples from prominent authors: **Ester Herlin-Karnell**, *op. cit.*, p. 35; **Steve Peers**, *op. cit.*, p. 166; **Valsamis Mitsilegas**, *EU Criminal Law after Lisbon. Rights, Trust and Transformation of Justice in Europe*, *op. cit.*, p. 63; **John A. E. Vervaele**, *The Material Scope of Competence of the European Prosecutor's Office: Lex incerta and Unpraevia?* in **Chloé Brière, Anne Weyembergh**, *op. cit.*, p. 419.

<sup>66</sup> CJEU, 5 February 1963, *N.V. Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Nederlandse Administratie der belastingen*, 26/62, EU:C:1963:1.

<sup>67</sup> CJEU, 15 July 1964, *op. cit.*, note 4.

Although this paradigm of thinking has been applied for a long time in the history of the Communities and then of the European Union, the concrete results have been poor: Member States discriminated against the Communities' financial interests, favouring their own (generated by internal fiscality). That was the reason why, in the historical judgment of the Luxembourg Court in the *Commission v. Hellenic Republic* case<sup>68</sup>, emphasis was placed on the principle of assimilation.

The harmonisation of Member States criminal law to combat fraud against the financial interests of the Union became necessary since the period immediately after the entry into force of the Maastricht Treaty and was achieved first by the so-called PIF Convention<sup>69</sup> and recently by the PIF Directive<sup>70</sup>. The fundamental legal basis for the adoption of the Directive is art. 83 para. (2) TFEU, corresponding to the auxiliary competence of the European Union in the criminal dimension of the area of justice, provided that the implicit (residual) competence has been absorbed by it.

It seems, however, contradictory that the primary legal basis for the harmonisation of the criminal law of the Member States intended to combat crimes against the financial interests of the European Union is to be found in a chapter of the TFEU entitled "*Judicial cooperation in criminal matters*" because the issue is obviously not about judicial cooperation. Moreover, the fundamental legal basis for the establishment of the European Public Prosecutor's Office, art. 86 TFEU is in the same chapter. However, the European Public Prosecutor's Office presupposes more than judicial cooperation in criminal matters, being a body of the Union, the result of a vertical integration, whose purpose is to investigate itself and prosecute the crimes established in its competence by Regulation (EU) 2017/1939.

During the debates held for the adoption of the Directive and the Regulation, any attempt to invoke, in the mentioned context, the provisions of art. 325 TFEU, apparently constituting a *lex specialis* in the area of fight against fraud affecting the financial interests of the Union, was doomed to failure, considering that there is no other basis for establishing minimum rules on the definition of offences and sanctions outside art. 83 TFEU.

Allocating the harmonisation of the criminal law of the Member States in combating offences against the financial interests of the European Union in its ancillary competence proves, once again, that the Member States are not able to assimilate, as their own value, the need to assure the integrity of the Union budget, the establishment of assets in which they participate and from whose income they benefit.

## VII. GENERAL PRESENTATION OF THE DOCTORAL THESIS

### CHAPTER I - INTRODUCTIVE CONSIDERATIONS

In the first chapter, we outlined the fundamental approaches developed in the following chapters of the doctoral thesis: the relationship between space and territory; space, as a legal order applied to a set of legal elements; the global and regional legal order; the specificity of the legal order of the European Union to be integrated into the legal orders of the Member States and the legal space as a topological space.

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<sup>68</sup> CJEU, Case 68/88, *op. cit.*, note 48.

<sup>69</sup> Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, OJ C 316, 27.11.1995.

<sup>70</sup> Directive (EU) 2017/1371, *op. cit.*, note 14.

We noticed that at the level of the European Union are defined, by Treaties, several "areas" or "spaces", among which: Area of freedom, security and justice (AFSJ), Schengen Area, European Economic Area, European Area of Education, European Area of Research etc. Moreover, the problem that can be formulated is that of the European Union itself as an economic space or area (through the concept of internal market), social space<sup>71</sup> and legal space (European Union law). Next, we analysed the AFSJ as a confluence of freedoms (those of a constitutional nature of the Union: the freedom of movement of goods, persons, payments and capital, but also those guaranteed by the Charter of Fundamental Rights of the European Union) and the security of Member States, their citizens and other people living in the EU.

Understanding by the dimension of a legal space the perspective from which it is viewed or the criterion according to which it is analysed, the criminal dimension of the justice space is the one corresponding to the criminal law *lato sensu*, seen as the reunion of criminal law and administrative criminal law.

Legal spaces are forms of "orderly pluralism", a concept developed by M. Delmas-Marty, which involves maintaining a separation between national law systems, without imposing their fusion, but at the same time building an order over them or an ordered space<sup>72</sup>.

We further put forward arguments in support of the thesis that the criminal dimension of the EU justice space has as its ultimate goal the judicial cooperation in criminal matters, but, alongside it, there is a growing identity criminal law, specific to the current level of EU integration.

Although the European Union does not yet have its own criminal law, it is endowed with criminal policies, which it has developed through the conclusions of the European Councils and other relevant programmatic documents.

In this chapter, we have paid particular attention to the general issue of the protection of the EU's financial interests, noting its dynamics, including the combating of fraud against financial interests, through three periods: before the Maastricht Treaty, after it, but before the Lisbon Treaty and post-Lisbon, respectively. The latter period has seen the most important progress, in particular the adoption of minimum rules on the definition and sanctioning of fraud against EU's financial interests, through Directive (EU) 2017/1371, but especially through the establishment of the European Public Prosecutor's Office, pursuant to art. 86 TFEU, by Regulation (EU) 2017/1939.

## CHAPTER II – THE VALENCES OF THE CONCEPT OF SPACE

The European Union's justice space is an expression of spatial production, from the point of view of legal geography (H. Lefebvre<sup>73</sup> and E. W. Soja<sup>74</sup>), and is a concrete manifestation of orderly legal pluralism, in which all its methods meet, in particular legal harmonisation and the principle of mutual recognition of judgments and judicial decisions and which is, at the same time, a topological space, by overlapping the Union's legal

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<sup>71</sup> Cécile Brousse, *L'Union Européenne, un espace social unifié?*, Actes de la recherche en sciences sociales 2017/4 (vol. 219), Le Seuil, 2017, p. 12-41.

<sup>72</sup> Mireille Delmas-Marty, *Les forces imaginantes du droit (II). Le Pluralisme Ordonné*, Édition du Seuil, Paris, 2006, p. 26.

<sup>73</sup> Henry Lefebvre, *The Production of Space*, translated by Donald Nicholson-Smith, Basil Blackwell, Oxford, 1991, p. 14, after: *La production de l'espace*, Édition Anthropos, Paris, 1974, 1981.

<sup>74</sup> Edward W. Soja, "Postmodern Geographies: The Reassertion of Space in Critical Social Theory", London, Verso Press, 1989.

order with the set of legal rules of the Member States. Like any topological space, the space of justice has dimensions. This doctoral thesis addresses the criminal dimension of this space, in which the distance between the rules transposing the harmonisation directives (or framework decisions) and the minimum rules of the latter can be calculated, thus providing a purely objective criterion for assessing harmonisation.

### **CHAPTER III. THE EU JUSTICE SPACE - ITS CRIMINAL DIMENSION**

In this chapter we have analysed the justice space of the European Union, in its criminal dimension, as a subspace of the AFSJ. We observed its regime, differentiated according to geography, through the “*opt-out*”, “*opt-in / opt-out*” and “*opt-in*” clauses, respectively, from which Denmark benefits or, as the case may be, the United Kingdom of Great Britain and Northern Ireland benefited (until 31 January 2020) and the Republic of Ireland still benefits. Throughout the chapter, we also made the necessary references from the perspective of the geography of the Schengen Area, the area applying the Schengen acquis, without being part of the Schengen Area, as well as the scope of the European Arrest Warrant, which was extended, recently (on 1<sup>st</sup> of November 2019), to Iceland and Norway.

The European Public Prosecutor's Office in its turn generates a space delimited by the enhanced cooperation on the basis of which it has been set out, a space circumscribed to the Union's space of justice in its criminal dimension. Some spatial variables are determined by elements of the national identity of certain Member States, reflected in particular features of their legal systems, which make them difficult to reconcile with paradigms possessing a high degree of generality. The explanation comes from the historical affiliation of the justice space criminal dimension to third pillar (post-Amsterdam) of the Union, with intergovernmental specificity, reflected by the Treaty of Lisbon, in the so-called “*emergency brake*”, enhanced cooperation and “*pseudo-veto*”.

This sophisticated and modular geographical and normative structure has been referred to by many authors as “*variable geometry*” (André Klip and Valsamis Mitsilegas) or “*variable geography*” (Marie Garcia, Simon Labayle, Clémentine Mazile, Marjolaine Roccati).

The legal issue of the criminal dimension of the EU justice space revolves around the concept of freedom (both philosophically and legally, as a value of the Union, but also in the constitutional meaning, in relation to its freedoms of movement), security (by ensuring the prevention and combating of crime, racism and xenophobia) and justice (as a judicial phenomenon, but also as a foundation of the society that has as common values those set out by art. 2 TEU). Criminality also includes the terrorism, although this phenomenon has sometimes been analysed in a separate category, situation determined by the interference between the criminal law and the international security policy, expressed in particular by the UN Security Council resolutions. In this context, we are talking about an interaction between the criminal dimension of the Union's justice area

and the common foreign and security policy, as it was the case in the CJEU judgment in *Kadi I*<sup>75</sup>.

The criminal dimension of the Union's area of justice falls within its shared competence with the Member States, and compliance with the principles of subsidiarity and proportionality is essential from this point of view. The latter responds to the need to respect the identity of the Member States from a legal anthropological perspective and to take decisions as close as possible to the citizen. Harmonisation should be used as little as possible, only through minimum rules and only when this is indispensable for achieving the Treaties aims. The possibility of adopting minimum rules on the definition of offences and sanctions is reduced to some particularly serious and potentially important cross-border offenses, the so-called "*Eurocrimes*", as well as to the situation where minimum rules proved essential to ensure the effectiveness of a policy of the Union, in which attempts have already been made to approximate legislation.

It appears, thus, through the harmonisation competence established by art. 83 para. (2) TFEU, the issue of the principle of effectiveness, with constitutional status in the European Union, which has been highlighted in the foreground by the provisions of the Treaties. At the same time, the same text reflects the essence of the *ultima ratio* character of criminal law. The principle of effectiveness stems from the supremacy of Union law, specific to its autonomous legal order and the monism it implies<sup>76</sup>. From the first enunciation of the principle of effectiveness (alongside with the principle of assimilation) in sanctioning matters, by the CJEU judgment in the "*Greek Maize*" case to the judgment of the Luxembourg Court in *Taricco I* case<sup>77</sup>, the *effet utile* has often been invoked with a view to the disapplication of some national law rules of certain Member States which were incompatible with the effectiveness of Union law.

Also from the principle of effectiveness, applied in criminal matters, the CJEU deduced the implicit (residual) competence of the European Community to harmonise the definitions of offences, on the legal bases of the first pillar of the Community, governing the Union's policies those harmonisations referred to, and not on the legal grounds of the JHA pillar, dedicated to judicial cooperation in criminal matters. In this respect, the judgments of the CJEU in the cases of "*Environmental crimes*"<sup>78</sup> and "*Shipping Pollution*"<sup>79</sup> were of paramount importance.

The criminal dimension of the EU justice space is conditioned by the protection and respect for human rights, not only a Union's value, as it stems from art. 2 TEU, but also a humanity one. The EU, always, as well as the Member States, when applying Union law, are bound by the Charter of Fundamental Rights of the European Union. In all cases, Member States are obliged to respect the rights enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECPHRFF), which, together with the fundamental rights stemming from the common constitutional traditions of the Member States, constitute general principles of Union law. Although the

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<sup>75</sup> CJEU, Judgment, 3 September 2008, *Yassin Abdullah Kadi și Al Barakaat International Foundation*, C-402/05 P and C-415/05 P, EU:C:2008:461.

<sup>76</sup> **Ion P. Filipescu, Augustin Fuerea**, *Drept instituțional comunitar european*, Ediția a V-a, Editura Actami, București, 2000, p. 54.

<sup>77</sup> CJEU, Judgment, 8 September 2015, *Ivo Taricco et. al.*, C-105/14, EU:C:2015:555.

<sup>78</sup> CJEU, Judgment, 13 September 2005, *Commission v. The Council*, C-176/03, EU:C:2005:542

<sup>79</sup> CJEU, Judgment, 23 October 2007, *Commission v. The Council*, C-440/05, EU:C:2007:625.

Treaties provide for the EU's accession to the European Convention, the Luxembourg Court, in its negative opinions<sup>80</sup>, has already rejected two projects of accession to this Convention, resulting in a very low probability of achieving this goal, due to structural incompatibilities between the mechanism of the Convention and the particularities of the legal order of the Union (mainly the principle of supremacy and that of mutual trust)<sup>81</sup>. In such a context, in order to facilitate the application of common standards on fundamental rights and freedoms, which are absolutely necessary for the correct application of the principle of mutual recognition of judgments and judicial decisions, including through the highly efficient referrals to the CJEU, the EU adopted a number of 6 directives for the harmonisation of the rights of persons in criminal proceedings. These have been analysed in the light of the CJEU relevant case law. Although the directives set standards that bring nothing more than the European Convention, their importance is undeniable because they are a real guide for practitioners of criminal law in the Member States and the European Public Prosecutor's Office to quickly check the compatibility of national law with the minimum human rights rules applicable in the EU's space of justice in its criminal dimension.

Closely related to the field of human rights in criminal proceedings and respect for the EU's value of the rule of law, there is also the issue of the independence of judges and prosecutors. Several cases of the CJEU have been addressing that matter, including: *Minister of Equality and Justice v. LM*<sup>82</sup>, *OG and PI*<sup>83</sup>, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*<sup>84</sup>, *Consortori Sanitari del Maresme v. Corporación de Salud de Maresme y la Selva*<sup>85</sup> etc. The judgments on these cases were instrumental in establishing as benchmarks of the independence of judges, their impartiality, the lack of external pressures from other state powers but also the absence of conflicts of interest. With regard to the status of prosecutors, fundamentally different from one EU Member State to another, the CJEU insisted only on their external independence, in the meaning that they could not receive orders or instructions in a particular case from the executive, especially from the Minister of Justice, as long as the orders related to the settlement of some cases coming from the hierarchical superiors within the prosecutor's offices were considered not to endanger their quality as “*judicial authority*”. This conclusion, which we deduced primarily from the judgment in *JR and YC* case<sup>86</sup>, does not pay due attention to the internal independence of prosecutors (their professional autonomy), because not only the ministers of justice could distort criminal justice outcome, but also prosecutors in important management positions could, sometimes, act illegally or unethically.

Next, we have examined the general aspects of the principle of mutual recognition of judgments and judicial decisions in criminal matters, the harmonisation by minimum

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<sup>80</sup> CJEU, Opinion 2/94, 28 March 1996, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECLI:EU:C:1996:140 and Opinion 2/13, 18 December 2014, EU:C:2014:2454.

<sup>81</sup> **Augustin Fuerea**, *Dreptul Uniunii Europene – principii, acțiuni, libertăți*, op. cit, p. 77-91.

<sup>82</sup> CJEU, Judgment, 25 July 2018, *LM*, C-216/18 PPU, EU:C:2018: 586.

<sup>83</sup> CJEU, Judgment, 27 May 2019, *OG and PI*, C-509/18 and C-82/19 PPU, EU:C:2019:456.

<sup>84</sup> CJUE, Judgment, 27 February 2018, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, C-64/16, EU:C:2018:117;

<sup>85</sup> CJUE, Judgment, 6 October 2015, *Consortori Sanitari del Maresme v. Corporació de Salud de Maresme i la Selva*, C-203/14, EU:C:2015:664;

<sup>86</sup> CJEU, Judgment, 12 December 2019, *JR and YC*, C-566/19 PPU and C-626/19 PPU, EU:C:2019:1077.

rules of definitions of offences and sanctions, as well as elements of criminal procedure and the strengthening of judicial cooperation in criminal matters through Eurojust, Europol and the mechanisms belonging to the Schengen acquis, as the main methods of integration used by the Union in the criminal dimension of its justice space. On this occasion, we noted the evolution of judicial cooperation in criminal matters in the EU, from the inter-state model to that of direct cooperation between competent judicial authorities and, finally, in the draft phase, to "fuzzy" cooperation, as we have called it or cooperation based exclusively on mutual trust<sup>87</sup>(as seen by Professor Ian Walden), assumed by the E-evidence Legislative Package of the European Union<sup>88</sup>. This form of cooperation is original by the fact it involves an order, accompanied by a certificate (as is the case of the European Investigation Order or Freezing and Confiscation Orders), which is transmitted from the judicial authority of a Member State to a particular, a provider of electronic communications or information technology services on the Union market, who must, in principle, execute it directly, without recourse to the judicial authorities of the Member State where it provides the service or is located in.

From a comparative law perspective, with reference to federalism, we analysed the similarities and differences of the principle of mutual recognition and the mechanism of the European arrest warrant with the "*Full Faith and Credit*" and "*Interstate Extradition*" clauses, set out by art. IV Sections 1 and 2, paragraph 2 of the US Constitution. We believe that these constitutional norms, part of the essence of American federalism, could have been a source of inspiration for the EU when the principle of mutual recognition was proclaimed the "*cornerstone of judicial cooperation*" and the European arrest warrant soon became the first legal instrument based on this principle.

As for the activities of Eurojust, Europol and those resulting from the mechanisms pertaining to the Schengen acquis, we consider that they are useful, they can bring an important contribution to purely horizontal judicial cooperation in criminal matters in the EU, but their effectiveness is undoubtedly limited, having rather a role in facilitating judicial cooperation than in making it effective. Eurojust, in particular, is a Union-wide representation structure of Member States' judiciaries, with encouraging results in the field of Joint Investigation Teams, in essence, the fruit of the purely horizontal formula of cooperation.

#### **CHAPTER IV. THE PROBLEM OF EU INTERVENTION IN THE MEMBER STATES CRIMINAL LAW**

In this chapter, we have analysed some of the most important principles of criminal law, as they appear reflected in the criminal dimension of the EU legal space, following in particular the transformations and adjustments that these principles have undergone in order to be compatible with the legal order of the Union, respectively with the constitutional principles of EU law. This methodology of analysis involved treating the

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<sup>87</sup> Ian Walden, *Cross-border evidence gathering: Cloud Act & eEvidence proposal*, presentation on 15 November 2019 at the Annual Conference on EU Criminal Justice 2019, Lisbon, 14-15 November 2019, organised by the Academy of European Law (ERA) and Centro de Estudos Judiciarios, Lisbon.

<sup>88</sup> Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters, COM/2018/225 and Proposal for a Directive of the European Parliament and of the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings, COM/2018/226.

principles from new perspectives, which were added to the ordinary ones, derived from classical criminal law. To a large extent, in this chapter, we have remained in the sphere of the substantial aspects of criminal law, addressing only tangentially some procedural issues, insofar as they are inextricably linked to the substantial ones.

The principles we have analysed, although they belong to the criminal law and are known mainly from the national law of the Member States, but also from the Charter of Fundamental Rights of the European Union, from ECPHRFF, as well as from the case law of the Luxembourg Court and of the Strasbourg Court, are applicable to the criminal dimension of the EU space of justice because the Union has the power to adopt minimum rules on the definition of offences and sanctions. In exercising this competence, set out by art. 83 TFEU, the EU must respect these principles precisely because they are enshrined in the Charter, the European Convention or because some of them result from the common constitutional traditions of the Member States.

The first principle examined was that of the legitimate purpose of criminalisation. In this context, we have highlighted the content of the universalism of criminal law (by the fact that, for the most part, it defends universal values of human societies, such as: life, health and bodily integrity, freedom in all its aspects, dignity, property, etc.) and that of the criminal particularism, characterised by the fact that some values constituting the purpose of criminal law are specific to certain human communities, and finally to states, having a strong identity relevance. The criminal law universalism is materialised in art. 83 para. (1) TFEU, which defines the autonomous competence of the European Union in the substantive criminal law area. Autonomous competence refers to a list of criminal typologies, defined on the basis of the criteria of serious gravity of the facts and values affected or endangered by them and at the same time by their transnational vocation, that imposes the necessity to be combated from a common basis.

This list of criminal typologies is repeated in many Union's legal acts based upon the principle of mutual recognition of judgments and judicial decisions (as is the case, for example, of the European arrest warrant), either as a condition for the operation of this principle, either as a definition of the criminal area in which it is not necessary to verify the condition of the double criminality.

All the criminal typologies included in the above-mentioned list have already been the subject of measures for the adoption of minimum rules on the definition of offences and sanctions.

The list of criminal typologies is flexible, allowing the Council of the European Union to extend it, by the unanimous vote of the Member States.

The auxiliary competence of the Union in the criminal dimension of the Union's area (space) of justice, expression of the criminal law particularism, regulated by art. 83 para. (2) TFEU, presupposes a completely different purpose of criminalisation. It no longer has an identity nature, but is purely utilitarian and is designed to ensure the principle of the effectiveness of Union law, while respecting the *ultima ratio* character of the criminal law. Thus, the Union can adopt directives laying down minimum rules on definitions of offences and sanctions when this is indispensable for the effective implementation of an EU (non-criminal) policy, which has been subject of harmonisation measures before.

Until now, this Union's competence has led to the adoption of minimum rules on the definition of offences and sanctions only in relation to market abuse and offences against the financial interests of the European Union.

In the context of the criminalisation's legitimate purpose, we have further examined some situations in which there are doubts as to the compatibility of certain Union's legal acts with this principle, in particular the establishment of minimum rules requiring Member States to criminalise child pornography in which the pornographic images represent an adult who appears to be a child or a person who does not exist in reality and which is fictionalised by special effects. The criminalisation of such deeds does not meet

the requirements of the legitimate purpose principle if we relate to the content of this principle as identified in the preamble of the legal act (namely, child protection). On the other hand, we can consider that such a criminalisation fulfils the requirement of the legitimate purpose if we consider that the protected value is a symbolic one, related to the dignity of the child, as a vulnerable human being. We support this idea also because Union law encompasses other similar situations of symbolic criminalisation with a strong nexus to the value of human dignity (for example, in connection with combating racism, xenophobia and other forms of intolerance).

In connection with this finding, we propose *de lege ferenda* that the preamble of the directives adopted pursuant to art. 83 TFEU must always state the legitimate purpose of the offences and concretely demonstrate how that purpose can be achieved through the minimum rules established.

Another issue related to the principle of legitimate purpose, this time symptomatic of the phenomenon observed in the last 20 years globally and known as "*preventive justice*", is that of the "*crimmigration*"<sup>89</sup>, as J.A.E. Vervaele calls it and in relation to which V. Mitsilegas pointed out that the legal acts governing it allow Member States to criminalise the facilitation of entry, transit and unauthorized stay in the territory of the European Union even when these acts are committed for purely humanitarian reasons or by persons in a special close relationship with illegal immigrants (eg members of their families)<sup>90</sup>.

We treated the principle of legality, which is fundamental in criminal matters, from a threefold perspective: the principle of legality of criminalisation and punishment (*nullum crimen, nulla poena sine lege*); the principle of certainty and predictability (*lex certa*) and last but not least, the principle of non-retroactivity (*lex praevia*) and that of the retroactive application of the more lenient criminal law (*lex mitior*).

In relation to *nullum crimen, nulla poena sine lege*, the main issue we explored was the existence or absence of the direct effect of the directives laying down minimum rules on the definition of offences and sanctions, as well as the possible direct effect of the directives on which a certain offence criminalised by the national law of the Member States depends. We came to the conclusion that neither the directives based upon the provisions of art. 83 TFEU nor the framework decisions of harmonisation in other Union policies (adopted upon the implicit/residual former competence of the Union) in the case of which certain constituents of the offences depend upon could not have direct effect. However, those directives impose to the national courts an obligation of conform interpretation of the national law.

*Lex certa* is a fundamental principle, amply explained by ECHR case law (we have referred to a small part of ECHR judgments on this subject: *Coëme v. Belgium*<sup>91</sup>, *Cantoni v. France*<sup>92</sup> and *Žaja v. Croatia*<sup>93</sup>), but also by that of the CJEU (*Intertanko*<sup>94</sup> and *Advocaten voor de Wereld VZW*<sup>95</sup> cases). Based on Manifesto I observations, we have identified some legal acts of the Union, such as Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent

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<sup>89</sup> John A.E. Vervaele, *European criminal justice in the European and global context*, *op. cit.*, p. 11.

<sup>90</sup> Valsamis Mitsilegas, *The normative foundation of the criminalisation of human smuggling: Exploring the fault lines between European and international law*, *New Journal of European Criminal Law*, Sage Publishing, volume 10, no. 1, 2019, p. 68-85.

<sup>91</sup> ECHR, Judgment, 22 June 2000, *Coëme et. al v. Belgium*, application no. 32492/96, 32547/96, 32548/96, 33209/96, 33210/96, CE:ECHR:2000:0622JUD003249296.

<sup>92</sup> ECHR, Judgment, 15 November 1996, *Cantoni v. France*, application no. 17862/91, CE:ECHR:1996:1115JUD001786291.

<sup>93</sup> ECHR, Judgment, 4 October 2016, *Žaja v. Croatia*, application no. 37462/09, CE:ECHR:2016:1004JUD003746209.

<sup>94</sup> CJEU, Judgment, 3 June 2008, *Intertanko*, C-308/06, EU:C:2008:312.

<sup>95</sup> CJEU, Judgment, 3 May 2007, *Advocaten voor de Wereld VZW v. Leden van Ministerraad*, C-303/05, EU:C:2007:261.

elements of criminal acts and penalties in the field of illicit drug trafficking, which describe very accurately and specifies the prohibited actions or omissions, in the form of an exhaustive enumeration, but which, at the same time, also contain some inappropriate conceptual overlaps, depending on the linguistic variant to which we refer.

There are legal acts of the Union, in the field researched in this chapter, which provide only minimum rules on the definitions of offences, leaving sanctions to the choice of Member States, under the condition to comply with the requirements to be effective, proportionate and dissuasive. Those are, in particular, legal acts that harmonise definitions of wrongdoing in other branches of law (administrative, tax, etc.), but which are considered criminal charges under the "*Engel Criteria*". We stand for the idea that such situations are not *ipso facto* infringements of the *lex certa* principle because Union law remains clear, but leaves the sanction up to the Member State's internal transposition law. The completeness of the principle of certainty and predictability must be assessed, accordingly, in relation to the latter.

However, we have identified some legal acts of the Union that allow too many exceptions to the minimum rules defining offences and some are so imprecise that it is unclear whether they still oblige Member States in any way. One such example is Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, but also Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector.

We identified the strongest interference in the certainty and predictability of criminal law, as aspects of the legality principle, to have occurred by the CJEU judgment in *Taricco I*, when the Court replied to an Italian court that the effective protection of the European Union's financial interests, pursuant to art. 325 TFEU, imposes the disapplication of the national provisions regarding the criminal liability statute of limitation, given that in the Italian criminal law the institution of the statute of limitation is considered to belong to the substantive law. The CJEU returned, however, by the judgment in the so-called *Taricco II* case<sup>96</sup> and refined this *dictum*, thus making it compatible with *lex certa*.

*Lex praevia* and *lex mitior* are principles that strictly apply in substantive criminal law. Criminal procedural law is of immediate applicability. The CJEU has dealt extensively with the issue of those principles in the case of *Berlusconi and others*<sup>97</sup>. In its judgment, the Luxembourg Court established that *mitior lex* is part of the common constitutional traditions of the Member States, thus being a general principle of European Union law.

We treated the principle of proportionality from a triple perspective, that of prospective (or material) proportionality, that of retrospective (or formal) proportionality and that of procedural proportionality. We used for the first two concepts the terminology coined by P. Asp.

Prospective (or material) proportionality is specific to the division of competences in the European Union, complementary to subsidiarity. Given that in the previous chapter we addressed the principle of subsidiarity, in this chapter, addressing the issue of proportionality in a holistic way, we focused on the homonymous principle from the point of view of the general Union law, with references to the criminal dimension of the legal space. We have thus found that the Treaties make an unjustified distinction, in our view, between the legal regime of subsidiarity and proportionality, in the sense that the opinion given by Parliaments / Parliamentary Chambers of the Member States under Protocol (No. 2) to the Treaties is a "*subsidiarity opinion*", limited to this particular issue.

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<sup>96</sup> CJEU, Judgment, 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936.

<sup>97</sup> CJUE, Judgment, 3 May 2005, *Silvio Berlusconi, Sergio Adelchi, Marcello Dell'Utri et.al.*, C-387/02, C-391/02 and C-403/02, EU:C:2005:272.

Therefore, we propose *de lege ferenda*, the completion of art. 6 Protocol (No. 2) on the application of the principle of subsidiarity and proportionality with a provision expressly establishing the need for the Parliaments / Parliamentary Chambers of the Member States to assess the principle of proportionality too. The title of such a document should accordingly be: "*opinion on subsidiarity and proportionality*".

Retrospective (formal) proportionality refers to the proportionality between offenses and sanctions and is specific to substantive criminal law. Within this issue, we reflected upon the concepts of ordinal and cardinal proportionality, introduced by von Hirsch<sup>98</sup>. We have found that the criminal law of the Member States of the European Union favours, as the case may be, one or the other of these typologies of formal proportionality and that a model common to the Member States of the Union is excluded for the moment. The minimum rules on the harmonisation of substantive criminal law adopted by the EU mostly practice the method of setting a minimum of the special maximum of the applicable sanction.

Starting from an idea launched by M. Delmas-Marty in connection with the evaluation of the gravity of a crime by aggregating several criteria<sup>99</sup>, we developed a mathematical model, based on the "*chi-square distance*". In general, this model allows the assessment of the seriousness of a given crime according to "*n*" criteria, each weighted with values between 1 and "*k*". The result is a general formula for the distance between the seriousness of a specific crime and the absolute seriousness (*ie* of the most serious crime). The smaller the value of this distance, the more serious the crime. The model, however, implies establishing a minimum and a maximum seriousness. Conceived in this way, the developed mathematical model holistically describes the formal proportionality, through both its dimensions: ordinal and cardinal.

Cardinal proportionality sometimes raises problems with Member States transposing legal acts that harmonise minimum rules on sanctions because the minimum punishment established in the Union's legal act may be higher than the general maximum prison sentence possible in a given Member State. This has already happened in the case of the transposition of Framework Decision 2002/475/JHA on combating terrorism in Finland.

Problems of non-compliance with ordinal proportionality have been identified in situations where, for offences very different as seriousness, legal acts of the Union establish the same minimum of the special maximum punishment, as it happens in the case of aggravated trafficking in human beings where the victim's life was endangered compared to the crime of counterfeiting money.

We analysed the procedural proportionality as set out in the context of the right to liberty and security, by art. 5 ECPHRFF. In this context, the ECHR jurisprudence has established, diachronically, that custodial measures in the context of criminal proceedings are taken when other preventive measures, less invasive, are ineffective (along with many other ECHR judgments, we consider particularly those in *Letellier v. France*<sup>100</sup> and

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<sup>98</sup> **Andrew von Hirsch**, *Proportionality in the Philosophy of Punishment*, Crime and Justice, vol. 16 (1992), The University of Chicago Press, p. 55-98.

<sup>99</sup> **Mireille Delmas-Marty**, *Harmonisation des sanctions et valeur communes : la recherche d'indicateurs de gravité et d'efficacité*, in **Mireille Delmas-Marty, Geneviève Giudicelli-Delage, Elisabeth Lambert Abdelgawad**, *L'harmonisation des sanctions pénales en Europe*, vol. 5, Unité mixte de recherche en droit comparé, Université Panthéon-Sorbonne, 2003.

<sup>100</sup> ECHR, Judgment, 26 June 1991, *Letellier v. France*, application no. 12369/86, CE:ECHR:1991:0626 JUD001236986.

*Mamedova v. Russia*<sup>101</sup>). From the jurisprudence of the CJEU, we have selected as relevant in this regard the case of *El Dridi*<sup>102</sup>, concerning the pre-trial detention of an illegal immigrant still found on Italian territory, after being summoned, by an administrative order to leave, a criminal offence under Italian law, but obviously contrary to the purpose of removing as soon as possible from the territory of the European Union illegal immigrants, established by Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals and in the same time disproportional by the legal nature of the measure.

The principle of the *mens rea* commission of an offence (*nulla poena sine culpa*) is not established either by the Charter of Fundamental Rights of the European Union or by ECHR. In our view, this is a common constitutional principle of the Member States, derived from higher constitutional values, such as the rule of law and the human dignity. In this regard, we have brought as arguments several judgments of certain constitutional jurisdictions in the European Union, mainly the Bundesverfassungsgericht in Germany and the Conseil Constitutionnel in France. In this way, we consider that *nulla poena sine culpa* or *mens rea* is a general principle of the European Union. We have also scrutinised the ECHR relevant case law (especially cases concerning the construction of buildings in Italy on land where real estate development was prohibited for environmental reasons: *Sud Fondi Srl*<sup>103</sup>, *Varvara*<sup>104</sup>, *Valico Srl*<sup>105</sup>, *GIEM Srl*<sup>106</sup>) and the CJEU (cases *Paraschevas Louloudakis*<sup>107</sup>, *Siegfried Ewald Rinkau*<sup>108</sup> and *Syuichi Yonemoto*<sup>109</sup>). We have found, with regard to both Courts, a relatively non-uniform case law on the principle of liability only for *mens rea* committed offences. Strict criminal liability (not based on *mens rea*) is not encouraged, nor it is completely excluded from the criminal dimension of the EU justice space, at least when it comes to the liability of legal persons. Compared to the situation found, we propose *de lege ferenda*, the inclusion of the principle *nulla poena sine culpa*, at least in the situations of criminal liability of the natural persons, in the Charter of Fundamental Rights of the European Union.

Regarding the competence to harmonise the criminal law of the Member States we found that art. 83 TFEU provides for two different species, both of which are ancillary, in the sense that their use is subject to the imperative of facilitating judicial cooperation in criminal matters and the application of the principle of mutual recognition of judgments and judicial decisions. It is about, as we have already shown, the autonomous and the auxiliary competence. With regard to the implicit (or residual) competence, recognised by the CJEU jurisprudence in the post-Amsterdam period, we are of the opinion that it no

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<sup>101</sup>ECHR, Judgment, 1 June 2006, *Mamedova v. Russia*, application no. 7064/05, CE:ECHR:2006:0601JUD000706405.

<sup>102</sup> CJEU, Judgment, 28 April 2011, *Hassen El Dridi alias Soufi Karim*, C-61/11 PPU, EU:C:2011:268.

<sup>103</sup> ECHR, Judgment, 20 January 2009, *Sud Fondi srl et al. v. Italy*, application no. 75909/01, CE:ECHR:2009:0120JUD007590901.

<sup>104</sup> ECHR, Judgment, 29 October 2013, *Varvara v. Italy*, application no. 17475/09, CE:ECHR:2013:1029JUD001747509.

<sup>105</sup> ECHR, Judgment, 21 March 2006, *Valico Srl v. Italy*, application no. 70074/01, CE:ECHR:2006:0321DEC007007401.

<sup>106</sup> ECHR, Judgment, 28 June 2018, *G.I.E.M. Srl et. al. v. Italy*, applications no. 1828/06, 34163/07 and 19029/11, CE:ECHR:2018:0628JUD000182806.

<sup>107</sup> CJEU, Judgment, 12 July 2001, *Paraschevas Louloudakis*, C-262/99, EU:C:2001:407.

<sup>108</sup> CJEU, Judgment, 26 May 1981, *Siegfried Ewald Rinkau*, 157/80, EU:C:1981:120.

<sup>109</sup> CJEU, Judgment, 8 September 2005, *Syuichi Yonemoto*, C-40/04, EU:C:2005:519.

longer exists after the entry into force of the Treaty of Lisbon and has been somehow transformed into the auxiliary competence, set out by art. 83 para. (2) TFEU.

Next, we identified the existence and described the common structural paradigm of Union legal acts setting out minimum rules on the definition of offences and sanctions. We observed that the legal acts mentioned have a common structure and that it predominantly includes the elements of the offenses in respect of which they establish the minimum rules. An interesting issue in this context is the one of the existence or absence of a general criminal law of the Union. Professor Klip answers that question in an affirmative way, considering that such a law consists in the general criminal law common to all EU Member States<sup>110</sup>. We have argued that the Member States, although in principle familiar with the same concepts concerning the general part of the criminal law, give different meanings and amplitudes to them, in which context the answer to the question we have asked should be rather negative. This solution also corresponds to the observation that the legal acts of the Union to which we refer define some concepts characteristic of the general part of criminal law in relation to the special types of offences to which they refer (eg the aggravating or mitigating circumstances, the liability of the legal person, the statute of limitation of criminal liability etc.). Other times, however, legal acts do not even define or outline the concepts used and at the same time do not contain references to the consideration of their meaning in the national law of the Member States. In such situations, such concepts should be treated as autonomous concepts. However, in order to be defined as such by case law, it is necessary to refer the matter to the CJEU, which has not happened yet in the vast majority of situations concerning these legal acts of the Union. Finally, it will be a matter of judicial harmonisation through the use of autonomous concepts.

A first important conclusion that we draw in connection with the paradigm of these legal acts concerns *iter criminis*, more precisely the increasing weight that the criminalisation of the attempt and the preparatory acts as distinct and autonomous offences acquired, especially lately. The "*preparatory or pre-incipient*" offenses, in the words of A. Ashworth and L. Zender<sup>111</sup>, have proliferated, especially in the field of counter-terrorism and, in particular, through Directive (EU) 2017/541. We have identified in this directive 9 typologies of minimum rules regarding the definition of such preparatory offences, an unnatural number for the compliance with the standards of criminal law and not with those of a "*preventive justice*", characterizing a "*security law*", as called by V. Mitsilegas<sup>112</sup>. The characteristic of these new criminal typologies is that the predominant element of the crime is the subjective one, including at least one qualified criminal purpose, but often a succession of two or many such purposes, while *actus reus* consists, mostly, in an innocuous action or inaction. The hypertrophy of the subjective elements, synchronic to the diminution of the importance of the material element, makes the criminal justice tend towards "*intention trials*" and not towards trials on material facts.

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<sup>110</sup> André Klip, *European Criminal Law. An Integrative Approach*, op. cit., p. 196.

<sup>111</sup> Andrew Ashworth, Lucia Zender, *Preventive Justice*, Oxford Monographs on Criminal Law and Justice, Oxford University Press, 2014, p. 98, 99.

<sup>112</sup> Valsamis Mitsilegas, *The Security Union as a Paradigm of Preventive Justice: Challenges for Citizenship, Fundamental Rights and the Rule of Law*, in Sergio Carrera, Valsamis Mitsilegas, Editors, *Constitutionalising the Security Union. Effectiveness, rule of law and rights in countering terrorism and crime*, Center for European Policy Studies, Brussels, 2017, p. 7.

Moreover, such a complex and broad subjective side of an offence is particularly difficult to prove, so the question can be asked whether this trend in criminal justice brings any concrete added value in combating those crimes.

Consequently, we conclude that, for the future, the directives of the European Union based on the provisions of art. 83 TFEU, should limit the expansion of the "*preventive justice*" model and return to the establishment of minimum rules on the definition of offences, which promote the criminalisation with a balanced *actus reus* and *mens rea*, condition inherent for the validity of the criminal law rules.

From the analysis of the provisions on jurisdiction comprised in the legal acts of the Union we draw another necessary conclusion, namely the need to elaborate an EU legal act on jurisdiction, laying down clear and binding rules in this regard for all Member States, so as to reduce the number of positive conflicts of jurisdiction, given the increasing rate of cross-border crime in the European Union. The previous legal acts on jurisdiction have had no effect whatsoever. Such a directive may be adopted based on art. 82 para. (1) (b) TFEU.

## **CHAPTER V. THE MUTUAL RECOGNITION PRINCIPLE IN THE CRIMINAL DIMENSION OF THE EU JUSTICE SPACE**

The procedural aspects of the European Union's space of justice criminal dimension are subject to the priority of the principle of mutual recognition of judgments and judicial decisions. This principle is in turn based on mutual trust between the EU Member States. Moreover, as we have seen, at present there is a tendency to devise mechanisms for judicial cooperation in criminal matters based directly on the principle of mutual trust, as is the case of EPOC and EPOC-PR, within the Union's "*E-evidence legislative package*".

Mutual trust is based on a presumption of conformity of the law and practice of all Member States with the Treaties and with the entire legal order of the European Union. This presumption is not absolute, but it is very strong, so in order to overthrow it, a two-stage legal action is needed. As a first step, based on convincing arguments, drawn most often from ECHR case law, reports of international organisations (UN, Council of Europe, etc.), conclusions of international inspections (such as those of the CPT), but also from internal sources within the concerned Member States (reports of the ombudsman, NGO's, etc.), there could be established compelling reasons, most often stemming from systemic or widespread deficiencies, to allow the courts of a Member State to suspect that another Member State has not complied with the Treaties and Union law. In the second stage, those courts have a duty to determine, through an interactive mechanism with the authorities of the Member State in respect of which such suspicions exist, the extent to which systemic and generalised deficiencies directly affect, in concrete terms, the case they have to decide upon.

This is the general paradigm for analysing the refusal to trust the authorities of another Member State, established in the Union's area of justice criminal dimension through a constant line of CJEU jurisprudence, starting with the judgment in *Pál Aranyosi and Robert Căldăraru* case<sup>113</sup>. Moreover, this type of reasoning was maintained by the Court even when there were doubts about the observance of the right to a fair trial, due to

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<sup>113</sup> CJEU, Judgment, 5 April 2016, *Pál Aranyosi and Robert Căldăraru*, C-404/15 and C-659/15, EU:C:2016:198.

the impairment of the independence of the judiciary, given the general shortcomings in the judicial system of a Member State (judgment in *LM* case, also known as the "*Deficiencies in the system of justice case*").

Another issue of mutual trust between EU Member States is the definition of the autonomous concept of "*issuing judicial authority*" of the European arrest warrant. The CJEU has established that the main feature of the concept of judicial authority is the independence from the executive. The problem was most acute in the case of German prosecutors as issuing authorities of the EAW (cases *OG and PI*). Other judgments of the CJEU have established that the lack of independence of prosecutors from the executive can be compensated by a court validation of the EAW issuance (the *NJ* case<sup>114</sup>). Surprisingly, however, the lack of internal independence of prosecutors within the Public Ministry's system (*ie* professional autonomy), when they issue EAWs, but could be subject to individual orders and instructions from their superiors, was not considered a problem likely to affect their "*judicial*" quality (judgment in *JR and YC* case<sup>115</sup>). In such type of situations, the important hierarchical subordination of prosecutors within the Public Ministry's system can at any time pave the way for orders and instructions that deprive the prosecutor of the specific independence of a true judicial authority. We therefore conclude that, in order for the prosecutor to be an EAW "*issuing judicial authority*", he/she should be completely independent from the executive and should enjoy an advanced professional autonomy, which excludes the possibility of hierarchical superiors to address individual orders or instructions. In our view, the only acceptable way to intervene upon a prosecutorial decision to issue or not an EAW, when the prosecutor has the quality of "*issuing judicial authority*", is that of the judicial review by a court, in accordance with the national law.

One of the major problems concerning the principle of mutual recognition of judgments and judicial decisions in criminal matters is the interference between the consequences of the application of this principle and the imperative of protecting the fundamental rights and freedoms, enshrined in the Charter and in the European Convention, at the minimum level of protection set out the Convention, implicitly through the ECHR jurisprudence. The interaction between the Treaties and the Charter, on the one hand, and the European Convention, on the other, in that context, gives rise to the so-called '*dialogue of the Courts*', *ie* the issue of interpreting fundamental rights and freedoms concrete content of in a given case, when both the jurisprudence of the ECHR and that of the CJEU are relevant. From the ECHR's point of view, its jurisprudence has long applied the so-called '*Bosphorus Presumption*', according to which a state is presumed not in infringement of the European Convention's provisions when it did nothing else but fulfil its duties as a member of the Union, applying, therefore, legal decisions of other states in its internal order. Of course, this presumption is relative, allowing it to be overturned whenever the protection of the Convention's rights and freedoms has been manifestly deficient<sup>116</sup>. However, starting with the judgment in *Avotiņš v. Latvia*, the ECHR ruled that the '*Bosphorus Presumption*' is no longer

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<sup>114</sup> CJEU, Judgment 9 October 2019, *NJ*, C-489/19 PPU, EU:C:2019:849.

<sup>115</sup> CJEU, Judgment, 12 December 2019, *JR and YC*, C-566/19 PPU and C-626/19 PPU, EU:C:2019:1077.

<sup>116</sup> ECHR, Judgment, 30 June 2005, *Bosphorus Airlines Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, application no. 45036/98, CE:ECHR:2005:0630JUD004503698.

applicable, and the Court will in any event verify compliance with the rights of the Convention even when their violation is not manifest<sup>117</sup>.

The automatic nature of the recognition of the judicial decisions of another Member State is the rule, but there are also exceptions to it, especially with regard to the European investigation order. For some investigative measures that may constitute the object of such orders and have a strong intrusive character into the rights and freedoms of persons, it is allowed to replace the measure requested by the order with another, which can achieve the same objective while being less invasive. Replacement depends exclusively on the executing authority and is justified both by the principle of procedural proportionality, interpreted by the application of the principle of assimilation in the judicial cooperation in criminal matters, and by the high probability that the issuing authority is unaware of the possibility of using less intrusive procedural measures.

As in the previous chapter, in the present one we have identified and presented a structural paradigm of the legal acts, this time that of the ones based on the principle of mutual recognition of judgments and judicial decisions in criminal matters. This approach has been illustrated mainly with examples from the EAW Framework Decision<sup>118</sup>, the EIO Directive<sup>119</sup> and the FCO Regulation<sup>120</sup>, but also from other legal acts belonging to the mentioned category.

We have found that these legal acts, regardless of their typology (framework decisions, directives, regulations) are structured according to the same elements: the object of the mutual recognition; its limits; the scope and the condition of double criminality; the object of the measure to which the judicial decision subject to recognition relates; the issuing authority and the executing authority; the content and form of the warrant or order; other conditions and guarantees; the transmission; recognition; grounds for non-recognition and non-execution (*ne bis in idem* principle, breach of the principle of legality in the executing Member State, infringement of the interests of the executing State in matters of national security, right to "*stay*"<sup>121</sup>, violation of fundamental rights, errors and omissions in mandates, orders or certificates); recognition / enforcement deadlines; remedies and the plurality of applications for recognition and execution.

We consider that one of the main trends in the area of legal acts establishing the application of the principle of mutual recognition of judicial decisions in criminal matters is to promote legal unification and ensure the direct applicability of the Union law provisions in this field, which is why regulations have begun to be promoted as preferred acts of the Union (ie the case of the FCO Regulation).

Another trend identified is that of the maximum synthetisation of an order or warrant content, based upon the principle of mutual recognition, in the form of a certificate (containing a form) which, in a first phase, accompanies the order or warrant (ie the case of an EIO) and subsequently replaces the order (ie the case of an FCO). In this way, the mutual recognition of judgments and judicial decisions in criminal matters generates the free movement of these certificates in the Union.

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<sup>117</sup> ECHR, Judgment, 23 May 2016, *Avotiņš v. Latvia*, application no. 17502/07, CE:ECHR:2016:0523JUD001750207.

<sup>118</sup> Council Framework Decision 2002/584/JHA, *op. cit.*, note 13.

<sup>119</sup> Directive 2014/41/EU, *op. cit.*, note 14.

<sup>120</sup> Regulation (EU) 2018/1805, *op. cit.*, note 6.

<sup>121</sup> Art. 4 para. (6) Council Framework Decision 2002/584/JHA, *op. cit.*, note 13.

## CHAPTER VI. EUROPEAN UNION LAW ON THE PROTECTION OF ITS FINANCIAL INTERESTS

Historically, the protection of the European Communities' financial interests has begun at Member State level through both administrative and criminal measures, taken without any formal obligation laid down in Community law to that effect, with the exception of administrative measures to combat fraud adopted under the common agricultural policy.

Subsequently, the European Union (after the Maastricht Treaty) adopted the first legal acts on the harmonisation of substantive law applicable to the administrative combating of deeds affecting the Union's financial interests. In this respect, the regulations necessary for the implementation of harmonised rules at Union's level are highlighted, through on-the-spot checks and inspections carried out by Commission representatives, first assembled in a task force called UCLAF, and then in an office, OLAF.

The first legal instrument of the Union which would initiate the harmonisation of the provisions of the substantive criminal law of the Member States in combating the offences against the financial interests of the Union, the PIF Convention, was adopted in 1995 through the intergovernmental mechanism specific to the third pillar of the Union, justice and home affairs. This Convention, as well as two of its three additional protocols, laid down, for the first time, minimum rules on criminal offences and sanctions for fraud and other offenses against the financial interests of the Union. The basic paradigm of the construction of such criminalisation, in terms of fraud, was conceived on the structure of any budget, including that of the European Union, as a dual, bipartite structure, containing the budget assets and expenditures.

The PIF Convention and its two protocols governing substantive criminal law also established the other offences directly related to fraud which must therefore be included in the scope of offences affecting the financial interests of the Union, in particular, corruption, money laundering and organised crime.

Like any international convention, in order to take effect, it must enter into force (through a minimum number of ratifications) and, finally, the States that have ratified it must implement its provisions into the national legal order through internal legal acts or directly apply its provisions, depending on the dualistic or monistic system they have. Pertaining to the criminalisation of offences and the establishment of sanctions, the principle of legality requires the State Party to carry them out by enacting national criminal laws.

In the case of the PIF Convention and its Additional Protocols, the process described was lengthy and its results, although making significant progress in combating the fraud against the financial interests of the Union, were not fully satisfactory as regards the integration of criminal offenses thus legislated in the criminal legal systems of the Member States.

The CJEU jurisprudence has sanctioned precisely this lack of normative integration at national level, as happened in the case of the national provisions regarding the statute of limitation for PIF offences, considered in the *Taricco I* case, as being likely to prejudice

the effective and dissuasive combating of fraud, although the criminal offences and sanctions for the criminal acts were properly transposed by the Member State .

These discrepancies, created in the legal systems of the Member States by the implementation/transposition of rules on criminal offences and sanctions, have drawn the attention of the Union's legislator to the need to systematically address the consequences that such rules may produce if they are not accompanied by other harmonising provisions of substantive criminal law, but also criminal procedural law, in direct interaction with the offences and sanctions.

This goal has been achieved through the PIF Directive, whose scope was not limited to updating the minimum rules on criminal offenses and sanctions for PIF offenses (including, *inter alia*, intra-Community VAT fraud which caused damage of at least EUR 10 million, through a transnational *modus operandi*), but also included harmonisation of the legal provisions regarding many other substantive criminal law rules, such as those on participation and attempt, or on statute of limitation, as well as on certain rules of criminal procedure, such as those which regulate jurisdiction and prevent conflicts of jurisdiction between Member States.

The PIF Directive, among other things, represents nothing more than the substantial criminal law support which generates, by transposition into of the Member States law, concrete offences which will be the subject of investigations and prosecutions conducted by the European Public Prosecutor's Office.

The elements mentioned in connection with the PIF Convention and the PIF Directive represent as many expressions of the criminal dimension manifested in the substantive law of the protection of the European Union's financial interests, together with an administrative dimension of this protection which manifests itself in the administrative investigations. This is about qualifying administrative, disciplinary or financial investigations as being based on criminal charges or involving criminal sanctions, according to the "*Engel Criteria*". Most such cases, in which judgments were given by the two Courts, from Strasbourg and Luxembourg, recognising administrative investigations as criminal, from the point of view of the nature of the charge, concerned the issue of VAT and the EU funding for agriculture and rural development.

This is a particularly important aspect of the criminal dimension of the protection of the Union's financial interests because it has the potential to influence the *ne bis in idem* principle. The application of both criminal and administrative sanctions is allowed by the PIF Directive only when administrative sanctions are "*sanctions that cannot be equated with criminal sanctions*", as stated in paragraph (17) of the Directive's preamble. If there is a *de facto* identity and the administrative sanctions are, in reality, of a criminal nature, in accordance with the jurisprudence mentioned above, the *ne bis in idem* principle is infringed. This principle is a fundamental guarantee of the rights enjoyed by suspects and accused persons in criminal proceedings, so that its disregard invalidates the criminal investigation and trial initiated.

The practical results that PIF Directive will generate in the protection of the European Union's financial interests will largely depend on the efficiency of the Union body that will be its main direct beneficiary, namely the EPPO.

## CHAPTER VII. THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE AND ITS INVOLVEMENT IN THE CRIMINAL DIMENSION OF THE EUROPEAN UNION'S JUSTICE SPACE

The European Public Prosecutor's Office is the only EU structure that has the nature of a judicial authority that carries out its activity in the criminal field, applying a vertical paradigm of intervention to its action. The Regulation establishing it was adopted more than 20 years after the first studies, analyses and concrete interventions carried out for this purpose, at the initiative of the European Commission: Corpus Juris, Commission Communication COM (2000) 608, the Green Paper and the Commission Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM (2013) 534.

All these studies, communications and proposals of the Commission foreshadows the establishment of a European Public Prosecutor's Office with an important vertical structure, acting in a "*single legal area*" or "*European judicial area*". In Corpus Juris, such an area required harmonisation at the highest level, even unification of the substantive criminal law of the Member States and the criminal procedure applicable to the fight against offences concerning the Union's financial interests. As a consequence, the European Public Prosecutor or the prosecutors delegated by him/her had the opportunity to investigate the crimes under the jurisdiction of the European Public Ministry in the territory of any Member State, applying a unified substantial criminal law and a single, sufficiently detailed procedure. The hierarchical structure of the European Public Ministry had to be purely linear, headed by a European Prosecutor General.

In general, these characteristics have been maintained, including in the Commission Proposal of 2013, however, nuanced. Thus, the idea of a "*single legal space*" is maintained, but a unification of the substantive criminal law and criminal procedure of the Member States is no longer expected, being substituted by minimum rules harmonisation. However, the hierarchical structure remains simple, consisting of European delegated prosecutors (EDPs) - European chief prosecutor (and deputies). The law applicable to investigations consists of the Regulation, which is supplemented by the domestic law of the EDP handling the case.

Following the decisions taken by the Council, during the Greek and Italian Presidencies in 2014, the EPPO structure would change radically, by adopting the collegial model, involving a complicated organisation, an extremely complex decision-making system, which has only disadvantages in terms of the effectiveness of this body of the Union, the speed of investigations, while jeopardizing certain principles of law, which are simultaneously guarantees of fundamental rights and freedoms, as is the case with the certainty and predictability of law. Under this model, maintained in the EPPO Regulation, the EDP appears, rather, as a law enforcement authority than as a prosecutor, in the judicial sense of the term.

The EPPO Regulation attaches great importance to the independence of the European Public Prosecutor's Office, seen as external independence. It does not, however, provide guarantees for the professional autonomy of the EDPs, neither in their relationship with the Member State to which they belong (through an unsatisfactory regulatory solution on the disciplinary liability in capacity of national prosecutors) nor in relation to the

European Public Prosecutor's Office. There are no guarantees for the EDPs that they may be replaced, at their request, from the investigation of a case or that they may ignore the instructions received or challenge them if they are contrary to the applicable law or to their conscience.

The uncertainty and unpredictability of the applicable law arises *ab initio*, from the moment a case is evoked or assigned, continues throughout the investigation (by the possibility of the permanent chamber to reallocate a case or of the EDP to assign a measure, in the context of cross-border investigations) and culminates with the possibility that the EPPO indictment may be brought before the competent court of a Member State other than the one whose PED investigated the case, which implies the application of a substantive criminal law and criminal procedure in the trial phase different of the one used in the criminal investigation. These cases are not expected to be very common, but they are certainly possible.

The Regulation itself is a direct source of many legal uncertainties in that it leaves the decision to regulate many key substantive aspects of the EPPO investigations and prosecutions to the college, which is empowered to adopt the EPPO internal rules of procedure, general guidelines and guidelines. There is no express judicial review of these rules of procedure, and an action for annulment before the CJEU is also not possible. This context means that the provisions of the internal rules of procedure, the general guidelines and the guidelines adopted by the college cannot be challenged as such, but only if, by their actual application, the Treaties or the European Union law have been infringed, by way of preliminary questions brought to CJEU by the national courts, at the request of the persons concerned.

Judicial review of EPPO acts intended to produce effects vis-à-vis third parties has been conferred, by Regulation, to the competent national courts, these acts being assimilated *fictio juris* to those of the national authorities. They are, however, undoubtedly acts of an EU body. We consider that this rule was established, rather for pragmatic reasons, otherwise the CJEU would be overloaded with an enormous number of requests for judicial review of EPPO acts. Although we understand such a motivation, we believe that, at least in the last resort, a remedy, even an extraordinary one, should have been reserved in favour of the CJEU.

The collegial system has been imposed by the Member States as an element of ensuring their representation in key EPPO decisions. In the absence of the collegial system, EPPO decisions would be entirely out of the hands of the Member States. From a historical point of view, the collegial system is consistent with the nature of the European Union's space of justice in its criminal dimension, in which the intergovernmental element has always been present and it still is, in attenuated forms. Thus, if the "*emergency brake*" is regulated, for identity reasons, in favour of the Member States in the legislative procedure set out by art. 82 and 83 TFEU, as well the concrete interests of the Member States participating in enhanced cooperation for the European Public Prosecutor's Office, are expressed in college. This is clearly the motivation behind the collegial system. However, there is a certain degree of inconsistency in such a reasoning from Member States part because the European Prosecutors have to be themselves independent from their Member States.

Because in the first part of these conclusions we have presented some of the most important negative consequences of the collegial system, we cannot fail to recognise that it gives greater legitimacy to the EPPO decisions. In this way, the horizontal dimension of the upper management level is introduced into the EPPO. Such a vision is in line with one of the requirements laid down for the EPPO in the TFEU, that of being established "*from Eurojust*".

Many essential elements of the EPPO functioning could not be analysed in this thesis because they are not yet established, and will be the subject of the internal rules of procedure, the general guidelines and the guidelines developed by the college. In these circumstances and due to the fact that EPPO does not yet have practical activity, a deeper assessment of the effectivity, coherence and added value of this Union body cannot yet be made. This is also one of the reasons why we have decided not to formulate, for the time being, *de lege ferenda* proposals regarding the EPPO. Its Regulation was adopted under extremely difficult conditions, through enhanced cooperation, and even so, there was a very good chance that the Council's negotiations would not lead to any results.

We limit ourselves to criticising the issues presented above, some of which can be improved by the EPPO internal rules of procedure, and to note with satisfaction that the goal of establishing a European Public Prosecutor's Office has been achieved. Through the EPPO, the criminal dimension of the EU justice space has made a very significant progress, paving the way for the broadening of its scope over time to serious cross-border crime in the European Union.

What we must emphasise, however, at the end of this chapter, is the questionable quality of the linguistic variants of the Regulation, an aspect that we invoked throughout the interpretation of the provisions of this legal act and for which we propose the use by the Romanian Ministry of Justice of the *corrigendum* procedure.

## **CHAPTER VIII. GENERAL CONCLUSIONS AND DE LEGE FERENDA PROPOSAL**

There is a general legal space on the entire planet. On its territories, belonging to different states, but also in international spaces (high seas, outer space, Antarctica, etc.), a set of legal rules and judicial decisions is subject to a complex legal order. This is the global legal space.

Within it, the legal relations that develop mainly from the intense commercial exchanges, are modelled according to the contemporary megatrends. Because some states impose these trends in the world legal order, we note the emergence of hegemonic legal models at the global and regional level. These models are then imitated, sometimes without discernment and without prior harmonisation or adaptation to national law, by other states. M Delmas-Marty calls this phenomenon "*de facto internormativity*". Other times, some states exchange legal models because they are required, being the most efficient ones. This happens through the force of argument and the validation brought by practice, and not through the geopolitical imposition of a hegemonic model. Often, states operate complementarities between the rules of certain legal topics, leading to harmonisation, ie the removal of asperities and dysfunctions that arise from interference

between their legal systems, especially in the various forms of international judicial cooperation.

The global unification of law, a utopia that aroused the interest of many legal scholars, seemed, at one point, achievable through hybridisation.

For understanding, probing, making comparisons and predictions, the legal space can be seen as a topological space. Applying scientific results in the field of topology and statistics, we can perform accurate calculations that allow us to establish the concrete, objective reality of legal phenomena, by exact sciences methods, which exclude subjectivism, inherent in classical legal interpretations and which are reliable.

To illustrate this reality, in the doctoral thesis we exemplified the above statement by measuring the "*chi-square*" distance in the case of two hypothetical transpositions adopted by two fictitious Member States of the European Union, based on a minimum rule definition of market abuse, in accordance with Directive 2014/57/EU. The approach led to the obtainment of numerical values for the distance (metric) between each transposition rule and the harmonisation rule set out in the Directive, while assessing that the rule adopted by the second Member State is not, in fact, a true transposition of the harmonisation rule.

Moving from the register of the analysis of legal spaces viewed in a general and global perspective to regional legal spaces, the thesis deals in detail with the issue of the legal space of the European Union, geographically connected to its territory, namely the reunion of the Member States territories, comprising a plurality of legal rules and judicial decisions, on which a legal order has been built: that of the European Union. This legal order is *sui generis*, integrated into the legal systems of the Member States whose courts are obliged to apply and who has supremacy over them. The vision on the legal order (system) of the Union, adopted in 1964, by the famous judgment of the Court of Justice of the European Communities in the case of *Costa v. ENEL*, is particularly valuable from the point of view of the research we undertook because we could not treat the issue of a legal space in relation to the European Union, in the absence of a clear, precise and consistent definition of its legal order (system).

Starting from the idea that Member States courts have an obligation to apply the EU legal order, we deduce that the legal space of the Union includes a judicial space or, more precisely, a space of justice.

On the other hand, we have established that legal spaces have dimensions and scales, and by the dimension of a legal space we mean the perspective from which it is viewed or the criterion by which it is analysed. Our approach thus continued to focus on the criminal dimension of the European Union space of justice, then looking at the fundamental characteristics of this space from the perspective of the chosen dimension. To proceed as such, we have referred to the Area of Freedom, Security and Justice, introduced into the constitutional level of European Union law by the Treaty of Amsterdam and which is currently governed by Title V of Part III TFEU, thus being included into the "*Union Policies and Internal Actions*".

In the absence of an AFSJ definition in the Treaties, legal acts or case law of the CJEU, we have defined it as representing all legal rules and administrative and judicial decisions existing, at a given time, on the territory of the Union, which refer to the freedom of movement of persons in relation to their individual and collective security, as

well as to the achievement of these objectives through public administration and, in particular, through justice, with respect for the fundamental human rights and freedoms, the various legal systems and legal traditions of the Member States. We then analysed its common characteristics with those of the Union's space of justice in its criminal dimension, but also distinguished some differences and nuances specific to the latter.

We have noted that the AFSJ is organised in three main components: freedom (in the meaning of freedom of movement and establishment, in the absence of controls at the internal borders of the Union, a matter considered in relation to both the provisions of the Treaties and the Schengen acquis, incorporated into Union law by the Treaty of Amsterdam), security (by ensuring the prevention and, in particular, the fight against serious crime, racism and xenophobia) and justice (by facilitating access to it, harmonisation of Member States law and by mutual recognition of judgments and judicial decisions).

The fundamental idea of the AFSJ is to ensure the freedom of movement and establishment of persons in an area without internal borders, doubled by policies and actions, concrete measures, materialised in legal acts of the Union, but also in programmes and action plans, to prevent and combat the possibility for perpetrators and participants in serious crimes to flee from justice by moving, in complete impunity, into the European Union's borderless area. If for criminals within the Schengen Area, the absence of internal borders is an objective reality, for the judicial and police authorities of the Member States these borders have continued and continue to exist.

The variable geography of the AFSJ also means that the internal borders in fact continue to exist in the vicinity of the Schengen Area and the Member States that are not part of it. Paradoxically, such borders do not exist on the limits of the EU territory with certain third countries: Switzerland, Iceland, Liechtenstein and Norway.

The AFSJ has an important security dimension, which is reflected in the Union's justice space and, in particular, in its criminal dimension, both directly, through protection against aggression, manifested internally (eg domestic terrorism) and through the Union's response, driven by the CFSP, to the global dimension of terrorist aggression (see the distinction between internal and external terrorism, practiced by the CJEU's legal syllogism in *Kadi and Al Barakaat International* case). The trend in this area, defined by that case law, is to attribute only the prevention and combating of domestic terrorism to the AFSJ, while the CFSP is entrusted with the task of contributing to the international fight against global terrorism.

Bearing in mind the criticisms of some prominent authors brought to the fact that there is a subordination of the freedom and justice to the idea of security, within AFSJ, we conclude that the security of the citizens of the Union and of the persons legally or illegally on its territory is far too important therefore due attention is to be paid upon. Freedom is valuable in a society where peace and security reign. What could the freedom represent in a world dominated by aggression, terrorism, serious criminality, individual and collective fears, generated by insecurity?

Of course, in the relationship between the components of the AFSJ, security and freedom must be balanced, through the Union's legal acts. Security can be equated with the idea of "*peace*" as a EU goal, while freedom is one of its values. It is up to the justice, a component of the AFSJ, to harmonise the two goals. On the other hand, the important

role of the Treaties, the Charter of Fundamental Rights of the European Union, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and of the numerous Union's legal acts on the harmonisation of criminal procedures of the Member States with the aim of ensuring fair trial and the rights of the suspect / accused person in the criminal trial, makes the security / freedom relationship to be based on solid grounds, able to ensure the prevention of abuse. What most authors criticise about Union law in this respect is the fragmentary and eminently national nature of the protection of human rights in the context of criminal proceedings. This character is generated, in part, by the application of provisions which outline a separation between the relevant standards of the Union and those of some Member States, which have higher standards (Article 53 of the Charter of Fundamental Rights of the European Union), as observed in the CJEU judgment in *Melloni* case<sup>122</sup>, or in the “*non-contamination clause*”, set out in art. 40 TEU, in *Kadi I* case. The same questions and even critics concerning the uncertainty of legal protection of fundamental rights and freedoms in criminal proceedings level have been systematically formulated by some authors in connection with the provisions of the EPPO Regulation<sup>123</sup>.

All these criticisms can be answered by the fact that harmonisation of fair trial guarantees in criminal matters<sup>124</sup> is sufficient to enable mechanisms based on the principle of mutual recognition of judgments and judicial decisions to operate in full respect for human rights in criminal proceedings, even if there are differences and particularities in the standards ensured by each Member State. As we have seen in *Melloni v Ministerio Fiscal*, sometimes the higher standard of a Member State in a matter of fundamental rights in criminal proceedings become, in time, minimum rule of the Union law (the obligation for Member States to ensure the retrial in the presence of those tried and convicted *in absentia*, denied by the said CJEU judgment, but introduced as a minimum rule by Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. The supremacy of Union law and the principle of mutual trust have a major role to play in resolving disputes arising from this issue, as we have seen in *Melloni* and in *Taricco I* and *II*.

Mutual trust in the justice of the Member States, the fundamental principle of the Union's area of justice, cannot only be presumed, but must in fact be concrete and solid. This could not be the case without the independence of the courts and the autonomy of the public prosecutor's offices, in each Member State and at Union's level. European Union law is deficient in terms of guaranteeing the independence of the judiciary and the autonomy of prosecutors. Practically, except for the provisions of art. 47 of the Charter (which states the need for the independence of the judiciary from the unilateral perspective of the individual's right to a fair trial), the relevant provisions of the EPPO

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<sup>122</sup> CJEU, Judgment, 26 February 2013, *Stefano Melloni v. Ministerio Fiscal*, C-399/11, EU:C:2013:107.

<sup>123</sup> **Valsamis Mitsilegas, Fabio Giuffrida**, *The European Public Prosecutor's Office and Human Rights*, in **Willem Geelhoed, Leendert H. Erkelens, Arjen W. H. Meij**, *Shifting Perspectives on the European Public Prosecutor's Office*, Editors, T.M.C. Asser Press, The Hague and Springer-Verlag GmbH, 2018, p. 59-98; **Stefano Ruggeri**, *Criminal Investigations, Interference with Fundamental Rights and Fair Trial Safeguards in the Proceedings of the European Public Prosecutor's Office. A Human Rights Law Perspective*, in **Lorena Bachmaier Winter**, Editor, *The European Public Prosecutor's Office. The Challenges Ahead*, Springer, 2018, p. 201-233.

<sup>124</sup> The problem has been analysed by **Valsamis Mitsilegas, Fabio Giuffrida**, *op. cit.*, p. 66-72.

Regulation and a vague reference to the "*rule of law*" (concept that possesses no legal definition in Union law), made by art. 2 and 7 TEU, there are no clear standards on the essential aspects of mutual trust in justice, to which we have referred. Without *de facto* (and not just presumed) trust of each Member State in the independent, politically and economically uninfluenced judiciary of all other Member States, the mechanism for mutual recognition of judgments and judicial decisions is inconsistent, far-fetched and utopian, and cannot constitute in any case, the "*cornerstone of judicial cooperation*", as the Tampere European Council Conclusions highlighted. In the criminal dimension of the European Union space of justice, the issue of mutual trust, as a basis for the principle of mutual recognition of judgments and criminal decisions, has been addressed by the CJEU in particular in the context of the execution of EAWs and mainly from three perspectives: improper detention conditions in some Member States, which could constitute a violation of the prohibition of torture and inhuman and degrading treatment (Romania and Hungary); the definition of the autonomous concept of "*issuing judicial authority*" of the warrant and the general deficiencies of the justice system characterised by the violation of the rule of law, in the matter of the courts independence (Poland).

Inadequate detention conditions have been constantly addressed, as has the problem of generalised deficiencies in the justice system, through a syllogism that involves two stages, one purely general and one particular, individual (*Pál Aranyosi and Robert Căldăraru*, etc.). Characteristic of the first stage is the establishment of general but credible circumstances, that in the issuing Member State there is a problem that could impede the execution of the warrant (detention conditions that violate fundamental rights, respectively political circumstances that affect the independence of the judiciary). Through this part of the methodology indicated by CJEU, executing authorities in the requested States can remove the presumption of conformity with the standards on fundamental rights and freedoms, according to the rule of law, of the requesting Member States. This stage does not entitle the requested court to refuse the execution of the warrant. Therefore, a second phase is needed for such a purpose, that of collecting data and information, in particular from the authorities of the issuing State, on the concrete situation in which the requested person will find himself/herself, following a possible surrender. Only if the issuing Member State refuses to provide the data and information requested by the executing court of the EAW or if all the evidence gathered shows a real and concrete danger that the requested person will be exposed to a serious violation of human rights as a result of his surrender, the requested court may refuse to execute the EAW.

This methodology for assessing a possible refusal to execute an EAW, as developed by the jurisprudence of the CJEU, has the merit of being fully in line with the internal structure of the principle of mutual recognition. Its major disadvantage is that it uses such a high degree of abstraction because there are no EU standards of its own regarding the conditions of detention or the independence of judges and prosecutors. In both areas, the jurisprudence of the CJEU avoids defining concrete parameters of acceptability. We consider the CJEU most relevant case in terms of inadequate conditions of detention to be *Dumitru Tudor Dorobanțu*<sup>125</sup>, because there, the German referring court asked

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<sup>125</sup> CJEU, Judgment, 15 October 2019, *Dumitru-Tudor Dorobanțu*, C-128/18, EU:C:2019:857.

concrete questions about the conditions of detention considered acceptable from the point of view of human rights, and the CJEU acknowledged the absence of any relevant Union rules, indicating the case law of the ECHR to be taken into account in this matter. The same absence of Union's rules and standards, this time on the rule of law and the independence of the judiciary, we have observed in *Minister for Justice and Equality v. LM* case.

The conclusion we draw is that the European Union lacks minimum rules on the conditions of detention and on the independence of the judiciary. Both areas are subject to the Charter of Fundamental Rights of the European Union (art. 1, 4, 47), representing rights of persons in criminal proceedings and the absence of common standards jeopardises the application of the principle of mutual recognition of judicial decisions. Therefore, the Union must assume the elaboration of minimum rules in those matters, based on art. 82 para. (2) lit. (b) TFEU.

The problem of the independence of judges and courts is contiguous to that of the independence of prosecutors. In view of the diversity of Member States' rules on the legal nature, powers, competences and status of prosecutor's offices and prosecutors, the Council of Europe, mainly through the Consultative Council of European Prosecutors and the Venice Commission, has set out standards by way of recommendations. These can be summarised, in short, in the importance of the external independence of the prosecutor's offices, but also of the professional autonomy of prosecutors. External independence implies limiting as much as possible the intervention of the executive power, and sometimes, even of the legislative one, in the decisions of the prosecutor's office as a collective entity. Professional autonomy means that, within the internal hierarchy of the prosecutor's office, the instructions and interference of hierarchical superiors in individual decisions on cases must respect the impartiality of the prosecutor as an individual, the law and his conscience. As guarantees of professional autonomy, the prosecutor should be able to challenge the instruction received, to ignore it, if it is manifestly illegal, or at least to ask to be replaced from the investigation or prosecution of the case, when the instructions are contrary to his conscience.

Apart from the lack of any Union rules on the external independence of prosecutors' offices and the professional autonomy of prosecutors, the jurisprudence of the CJEU has shown that only external independence is important, completely ignoring the issue of professional autonomy (see *JR and YC case*).

In the absence of the possibility for the case prosecutor to ignore his superior's instructions when they are clearly illegal, to challenge them and ask to be replaced from the investigation or prosecution of the case, when the instructions, even legal, contradict his conscience, we cannot talk about a "*judicial*" decision. The essence of the "*judicial*" character of a body is to be impartial. However, this feature is usually missing in the case of a prosecutor who is required to execute orders and instructions of his superiors that are illegal or contrary to his conscience. On the other hand, even in Member States where prosecutors cannot receive individual instructions from the Minister of Justice, it is usually the Minister who appoints or nominates the Prosecutor General. In some cases, this situation may lead to informal relations between the prosecutor's office and the Minister of Justice or other politicians involved in the process of appointing the

prosecutor general, which may lead to pressures on the prosecutors, in an individual case, through the prosecutorial hierarchy.

The total neglect of the European Delegated Prosecutors professional autonomy is an indisputable feature of the EPPO Regulation. The mentioned legal act transforms the EDP, rather, into a judicial police officer, as long as the significant decision-making attributions on the case belong to the hierarchy of the EPPO, respectively to the European prosecutors and the permanent chambers.

There are also other contradictions in the jurisprudence of the CJEU regarding EAW. For example, if in the *Niculaie Aurel Bob-Dogi* case<sup>126</sup> the CJEU ruled that the EAW must be distinct from the national arrest warrant, both involving the assessment of legality and, in particular, the opportunity, under different conditions and standards, in the case of *XD*<sup>127</sup>, the same Court considered that the previous assessment of the appropriateness of issuing an EAW by a court on the occasion of the issuance of a national arrest warrant, given that the EAW can only be issued by the prosecutor does not contradict the EAW Framework Decision. These conclusions are obviously contradictory.

Even from the beginning of the thesis we have been concerned with the relationship between space and territory, we have analysed the main aspects of European Union law relevant in this regard in the context of the criminal dimension of the European Union justice area, such as "opt-in", "opt-out" and "opt-out/opt-in" regimes, "emergency brake", "pseudo-veto", etc., aspects that have already been presented in this summary, in the context of Chapter III of the thesis.

The Schengen acquis, incorporated by the Treaty of Amsterdam into the Union law, is another modulating factor of the territoriality of the AFSJ and the Union's space of justice. Although it mainly affects police and, to a lesser extent, judicial cooperation, some of its elements are nevertheless relevant in the criminal dimension of the EU justice space. This is the case, for example, of art. 54 CISA<sup>128</sup>, which regulates in a complete and original manner the fundamental principle of *ne bis in idem*, generating consequences in the field of judicial cooperation in criminal matters, as we have seen in the judgments of the CJEU in *van Esbroek*<sup>129</sup>, *van Straten*<sup>130</sup>, *Norma Kraaijenbrink*<sup>131</sup>, *Gözütok and Brügger*<sup>132</sup> and, especially in the context of EAW, in *Gaetano Mantello*<sup>133</sup> and *Jürgen Kretzinger*<sup>134</sup>. The Schengen acquis also applies, in part, to non-Schengen Member States but also to four third countries: Switzerland, Iceland, Liechtenstein and Norway. Moreover, even CISA, through its additional protocols, reserves special regimes for Denmark, the Republic of Ireland and the United Kingdom.

Another relevant issue with regard to the Schengen acquis incorporated into Union law, from the perspective of the criminal dimension of the justice space, is that of cross-

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<sup>126</sup> CJEU, Judgment, 1 June 2016, *Niculaie Aurel Bob-Dogi*, C-241/15, EU:C:2016:385.

<sup>127</sup> CJEU, Judgment, 12 December 2019, *XD*, C-625/19 PPU, EU:C:2019:1078.

<sup>128</sup> Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239, 22.09.2000.

<sup>129</sup> CJEU, Judgment, 9 March 2006, *Leopold Henri Van Esbroek*, C-436/04, EU:C:2006:165.

<sup>130</sup> CJEU, Judgment, 28 September 2006, *Jean Leon Van Straten*, C-150/05, EU:C:2006:624.

<sup>131</sup> CJEU, Judgment, 18 July 2007, *Norma Kraaijenbrink*, C-367/05, EU:C:2007:444.

<sup>132</sup> CJEU, Judgment, 11 February 2003, *Hüseyin Gözütok and Klaus Brügger*, C-187/01 and C-385/01, EU:C:2003:87.

<sup>133</sup> CJEU, Judgment, 16 November 2010, *Gaetano Mantello*, C-261/09, EU:C:2010:683.

<sup>134</sup> CJEU, Judgment, 18 July 2007, *Jürgen Kretzinger*, C-288/05, EU:C:2007:441.

border surveillance, set out by CISA, conceived by the Convention as a measure of police cooperation, but which is in our view, of a mixed nature, also containing elements of judicial cooperation in criminal matters, highlighted in the context of other legal instruments providing for it, as is the case of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 1959), still applicable to EU Member States in the context of the Union's area of justice.

Therefore, the territoriality test led to the conclusion of the existence of a fragmentation or, rather, a flexibility, of the EU justice area from the perspective of its criminal dimension.

In particular, in the context of the *ne bis in idem* principle and that of combating fraud against the EU financial interests, but also in general, in relation to the entire criminal dimension of the Union's space of justice, the CJEU has developed an important jurisprudence on the "criminal charge", an autonomous concept defined for the first time by the ECHR, in connection with art. 6 ECPHRFF (right to a fair trial), by a line of judgments, the most important being *Engel and Others v. The Netherlands*<sup>135</sup>, but also *Ezeh and Connors v. The United Kingdom*<sup>136</sup>, *Öztürk v. Germany*<sup>137</sup>, *Bendenoun v. France*<sup>138</sup>, *Jussila v. Finland*<sup>139</sup>, etc. Based on this jurisprudence, the ECHR has established that some offences belonging to other branches of law (administrative, fiscal, labour law) must be considered as determining "criminal charges" when they meet certain conditions: the nature of the offence is essentially criminal (by the general addressability of the norm that forbids it, the preventive and dissuasive function of the rule and the role of *mens rea* as a condition of the offence) and the sanction set out for committing the offence is, by its nature and seriousness, similar to a punishment. In order to simplify the wording, we used the mentioned concept by the phrase "*Engel Criteria*", coined by A. Klip. These "*Criteria*" have been considered by the CJEU in a number of cases, most of which referred to fraud against the Union's financial interests: *Käserei Champignon Hofmeister*<sup>140</sup>, *Łukasz Marcin Bonda*<sup>141</sup>, *Hans Åkerberg Fransson*<sup>142</sup>, *Luca Menci*<sup>143</sup>, *Mauro Scialdone*<sup>144</sup> etc. Through these judgments, the CJEU established concrete rules regarding the possibility or, as the case may be, the prohibition of applying administrative and criminal liability for the same deeds, so as not to infringe the *ne bis in idem* principle.

The general character of the "*Engel Criteria*" led, in M. Delmas-Marty's opinion, to the formation of a true administrative criminal law. As we detailed in the thesis, we only partially share this opinion, in the sense that the administrative criminal law should not

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<sup>135</sup> *Op. cit.*, note 45.

<sup>136</sup> ECHR, Judgment, 9 October 2003, *Ezeh and Connors v. UK*, applications no. 39665/98 and 40086/98, CE:ECHR:2003:1009JUD003966598.

<sup>137</sup> ECHR, Judgment, 21 February 1984, *Öztürk v. Germany*, application no. 8544/79, CE:ECHR:1984:0221JUD000854479.

<sup>138</sup> ECHR, Judgment, 24 February 1994, *Bendenoun v. France*, application no. 12547/86, CE:ECHR:1994:0224JUD001254786.

<sup>139</sup> ECHR, Judgment, 23 November 2006, *Jussila v. Finland*, application no. 73053/01, CE:ECHR:2006:1123JUD007305301.

<sup>140</sup> CJEU, Judgment, 11 July 2002, *Käserei Champignon Hofmeister GmbH & Co. KG and Hauptzollamt Hamburg-Jonas*, C-210/00, EU:C: 2002: 440.

<sup>141</sup> CJEU, Judgment, 5 June 2012, *Łukasz Marcin Bonda*, C-489/10, EU:C:2012:319.

<sup>142</sup> CJEU, Judgment, 26 February 2013, *Åklagaren v. Hans Åkerberg Fransson*, C-617/10, EU:C:2013:105.

<sup>143</sup> CJEU, Judgment, 20 March 2018, *Procura della Repubblica v. Luca Menci*, C-524/15, EU:C:2018:197.

<sup>144</sup> CJEU, Judgment, 2 May 2018, *Mauro Scialdone*, C-574/15, EU:C:2018.295.

be considered substantially, but only procedurally, in determining the guarantees of a fair trial in criminal matters. Moreover, the concept was born in this context and the CJEU analyses it from the same perspective.

In conclusion, we consider the "*Engel Criteria*" as the foundation of outlining a substantial criminal law with a procedural telos, which ignores the purely positive aspect of classical criminal law, namely the provision of the offence by law. The ECHR and CJEU jurisprudence in this matter has emphasised the formalistic nature of the criterion promoted by positive law, thus neglecting it, then focusing on the essence of the criminal law, that of encompassing the most serious forms of wrongdoing, which requires the combating by the most severe sanctions available to a given society, which we generically call punishments.

Ensuring free access to justice is a primary requirement of this space, and in its criminal dimension this condition means, above all, access to criminal proceedings for victims of crime. Directive 2012/29/EU significantly improves the legal status of victims by making it obligatory to provide support and protection to them, in particular in order to prevent secondary victimisation and to encourage victims to report crime. What this legal act completely avoids is the imposition of an obligation for Member States to grant victims of crime the status of a party or participant in criminal proceedings. This is obviously a concession made to the "*legal traditions*" and "*legal systems*" of some Member States (or former ones), in which the victim has no legal status in the criminal proceedings.

Subsidiarity and proportionality are constitutional principles of the EU, which determine or condition a set of other essential principles of the justice space criminal dimension: the legality; *effet utile*; the *ultima ratio* and *de minimis* character of the criminal law, but also the effectiveness and the principle of assimilation.

These principles realise also the respect for the legal identity of the Member States and the aim of taking the decision as close as possible to citizens, that of reserving harmonisation to minimum rules of criminal law and criminal procedure in order to create the premises for the proper functioning of the principle of mutual recognition of judgments and judicial decisions, the preference for *de minimis* harmonisation, instead of other, broader forms, or legal unification (as attempted in the *Corpus Juris*).

It follows from the same principles that the harmonisation of the criminal law is limited to an autonomous version, represented by a predetermined list of serious criminal typologies (*Eurocrimes*), with the possibility of extending the list only under extremely restrictive conditions and to an auxiliary version, in a view of achieving the effectiveness of the Union's policies that have previously been subject to non-criminal harmonisation.

Subsidiarity and proportionality must be assessed objectively, through quantitative and qualitative indicators and through the effectiveness of the measures adopted. We see here another area in which statistical tests could play an important role, allowing a genuine objective evaluation.

The EU space of justice criminal dimension history has raised the issue of the legal grounds that may be invoked for the adoption of legal acts in this area, namely a substantive Union law provision, related to the effectiveness of a policy or action or a judicial cooperation in criminal matters provision. This debate has been constantly fuelled by a tendency of the Commission to federalise the ideology of the decision to adopt

criminal measures, striking at the diametrically opposed position of the Council, as the Upper House, in the framework of the EU bicameralism<sup>145</sup>, which represents the Member States and consequently defends a sovereigntist vision, expressed by choosing legal bases specific to the judicial cooperation in criminal matters.

If at first the Commission obtained validation for its position from the CJEU, through its judgments in the cases "*Environmental Crimes*" and "*Shipping Pollution*", then, post-Lisbon, absolutely all relevant legal acts were adopted under art. 83 TFEU (belonging to the judicial cooperation in criminal matters, for the adoption of minimum rules on offences and sanctions). Even the Commission's attempt to impose art. 325 TFEU, as a substantive legal basis, in the draft PIF Directive, was countered by the Council, which changed the legal basis of the Directive, into art. 83 para. (2) TFEU.

In the light of the foregoing, we answer in the negative to A. Klip's question whether there is still a '*residual competence*', post-Lisbon, that is to say, an EU competence to adopt minimum rules on criminal offences and penalties on substantive grounds and not only in those covered by Chapter 4 of Title V, Part III TFEU, on judicial cooperation in criminal matters.

It is precisely such an answer that raises the fundamental question of what justice really means in the European Union. Is it "*Justice*" in the deep, philosophical sense of the term, a substantive justice, a justice of "*good and equity*" (*boni et aequi*), which contains restorative and distributive elements (as seen by H. Lefebvre, E. Soja but, above all, D. Kochenov, G. de Búrca and A. Williams<sup>146</sup>) or is it just an infrastructural justice, which lacks such vocations, a set of mechanisms for judicial cooperation?

These ideas reflect the debate on the deficit of justice in the European Union, as launched by D. Kochenov *et al.* If until now, there has been and continues to be talk of a deficit of democracy in EU, the issue of the deficit of justice has, in recent years, captured the forefront of the debate.

We do not find solid arguments against the idea of the Union's justice deficit, but our scientific approach is much more limited and aims at a sequential reality, namely the space of justice, in its criminal dimension. However, elements of restorative justice can also be identified in this area, for example in legal acts relating to the access to justice for victims of crime and their rights, in particular those relating to support, protection and compensation.

The deficit of justice in criminal matters is directly linked to the methods of integration used in the Union's area of justice, in its criminal dimension. Its cause consists in the subsidiarisation of harmonisation to mutual recognition. The latter principle is not able to provide criminal justice, in a substantial sense, but it has the merit of '*unblocking*' (term coined by Jack Straw<sup>147</sup>) the evolution of the justice space, which has reached a serious impasse due to absolutisation, over a period of time, of harmonisation and, in particular, its tendency to generate legal unification.

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<sup>145</sup> **Augustin Fuerea**, *Legislativul Uniunii Europene – între unicameralism și bicameralism*, Dreptul no. 7/2017, p. 187-200.

<sup>146</sup> **Andrew Williams**, *The Problem(s) of Justice in the European Union*, in **Dimitry Kochenov, Gráinne de Búrca, Andrew Williams**, (Editors), *Europe's Justice Deficit*, Hart Publishing, Oxford and Portland, Oregon, 2017, p. 33-49 and other contributions to the same collective work.

<sup>147</sup> Jack Straw discourse at Cardiff European Council, 15<sup>th</sup> and 16<sup>th</sup> June 1998, pleading for mutual recognition in AFSJ.

Accepting the imperfections and lack of legal coherence of the principle of mutual recognition of judgments and judicial decision from the perspective of a true substantial justice of the European Union in criminal matters, we recognise the merits of this method of integration from the point of view of the AFSJ, ensuring effective judicial cooperation to counter criminal offences generated as adverse effects by the freedom of movement and establishment within the Union.

Diachronically, mutual recognition has allowed the evolution of judicial cooperation in criminal matters. Thus, from the model of classical cooperation, through letters rogatory, addressed by a state to another state, the mutual recognition of judgments and judicial decisions has allowed progress towards the paradigm of "*orders and certificates*", which are addressed directly and reciprocally by the judicial authorities of the states and, more recently, to the cooperation we have called '*fuzzy*', in which certificates are sent by the judicial authorities of a Member State directly to public or private entities in another Member State established in its territory, or only offering services on the Union's internal market (finally, a kind of transnational *dedimus*, see *E-evidence legislative package*).

The criminal dimension of the European Union space of justice, seen from the perspective of judicial cooperation, also includes its facilitation formulae, carried out by Eurojust, Europol, the European Judicial Network, the Schengen acquis and will benefit, starting from the end of 2020, of the EPPO, as the first form of structuring of a supranational prosecutor's office (and not an international one, as is the Office of the Prosecutor of the International Criminal Court case).

In this thesis, we have addressed the issue of the legal space in general, the area of freedom, security and justice and the area of justice of the European Union in particular. We have come to the conclusion that there is a criminal dimension to the Union's justice area. It contains legal rules which affect the criminal law and criminal procedure of the Member States, either directly when these rules are set out by regulations or indirectly by the transposition of the directive and framework decisions adopted by the Union in this matter.

We are not yet able to talk about a European criminal law or a European Union criminal law, neither substantially nor procedurally, but only about a EU right to intervene in the criminal law and criminal procedure of the Member States, with the aim of streamlining judicial cooperation in criminal matters between Member States. The only partial exception to this assertion could be the European Public Prosecutor's Office, established by its Regulation, as a body of the Union which has the power to investigate and prosecute before national courts in criminal cases, the commission of offences against the Union's financial interests. Even in the cases that will be prosecuted by the EPPO, it should be noted that, with the exception of a few rules of procedure directly established by the Regulation, the criminal law and criminal procedure of the Member States will apply. Therefore, we can conclude that the EPPO Regulation creates a new judicial authority within the criminal dimension of the Union space of justice, rather than a real exception to the premise of the inexistence of a European Union criminal law.

There are, however, certain elements of Union law which raise more sensitive issues in relation to the exercise of its powers in the field of intervention in the criminal law of the Member States, in the sense that they do not appear as mere instruments for streamlining of judicial cooperation, but rather as autonomous manifestations of the

Union, based upon substantive rationale (for example, the particular seriousness of some offenses). There is the case of art. 83 para. (1) TFEU, in which the establishment of minimum rules on the definition of offences and sanctions is subject to a substantial criterion, while the utilitarian one (the need for these offences to be combated on a common basis) is subsidiary.

There are two fundamental aspects of the criminal dimension of the Union's area of justice: the security and the protection of fundamental rights and freedoms. The balance between them is, most of the times, established, at programmatic level, by the EU criminal policy, understood, *latissimo sensu*, as the totality of the actions subsumed to certain methodical strategies, which have an effect on criminality.

Even if it does not have the power to criminalise and punish, the European Union can decide on the criminal content elements and sanctions to be imposed, as a minimum, on the legislative bodies of the Member States. This phenomenon sometimes leads to an *ex novo* criminalisation by Member States of certain deeds or to an increase in the quantum of the sanctions initially set out by national law for the same offences. By doing so, the Union can generate criminal hyperregulation in the Member States law, but also an increase in the punishments quantum already established for some offences, which can be harmful from the point of view of their criminal law systems coherence.

The universalism of criminal law imposes the criminalisation of particularly serious offences, and its relativism establishes the condition that the legitimate purpose of the criminalisation has an identity character. Sometimes, the purpose is considered legitimate even if it is purely symbolic, without actually infringing on a person's rights.

It is thus required that the preamble of the directives adopted pursuant to art. 83 TFEU should always state and define, in a concrete and sufficiently broad manner, the legitimate purpose of the minimum rules imposed on Member States, without confining themselves to a far too general wording and whose legitimacy, from the point of view of the rules actually adopted, is almost impossible to establish. Otherwise, in the absence of the internalisation by the citizens of the Union, including legal professionals, of the legitimacy of the criminalisation, an attitude of rejection of those minimum rules, considered aloof and a perception of a lack of necessity, subsidiarity or proportionality of the legal acts establishing them usually appears.

Proceeding to the analysis of the fundamental principles of criminal law, we paid special attention to the principle of legality and, in particular, to its particular aspect, consisting in the legality of criminalisation and punishment (*nullum crimen nulla poena sine lege*). In this context, we have come to the conclusion that the directives harmonising the criminal law of the Member States cannot have a direct effect upon individuals because otherwise the principle of legality would be infringed, as it is clear from the CJEU jurisprudence in the cases: *Pretore di Salò*<sup>148</sup>, *Kolpinghuis Nijmegen BV*<sup>149</sup>, *Arcaro*<sup>150</sup>, etc. Victims of actions or inactions which have not yet been criminalised by a Member State, even though the deadline for the transposition of the directive requiring criminalisation has expired, will only be able to claim compensation from that Member

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<sup>148</sup> CJEU, Judgment, 11 June 1987, *Pretore di Salò*, 14/86, EU:C:1987:275.

<sup>149</sup> CJEU, Judgment, 8 October 1987, *Kolpinghuis Nijmegen BV*, 80/86, EU:C:1987:431.

<sup>150</sup> CJEU, Judgment, 26 September 1996, *Arcaro*, C-168/95, EU:C:1996:363.

State for damages suffered in breach of European Union law, based on the Francovich liability.

Although directives laying down minimum rules on the definition of offences and sanctions have no direct effect, other categories of directives, which influence the realisation of the elements of an offence criminalised by the internal law of a Member State, can have ascendant direct effect.

The other principles of harmonisation of substantive criminal law, as well as the EU harmonisation competence in this matter, have been presented in this summary, in relation with Chapter IV of the thesis, so we will not return to them.

Next, we outlined a structural paradigm of the EU legal acts laying down minimum rules on the definition of offences and sanctions, analysing, on this occasion, numerous legal and criminal policy issues regarding their concrete aspects.

Some conclusions regarding the structural paradigm of the analysed legal acts concentrate on the following aspects:

- the offences for which minimum rules have been adopted are, for the most part, commissive and not omissive;
- the subjective element in the case of numerous terrorist offences is hypertrophied, being dependent on a plurality of criminal purposes and motives, so that the material element is almost missing; this is the case, for example, with the crime of receiving training for terrorist purposes. We consider that such criminalisation raises serious structural problems, as long as the material element is not well defined, and the whole crime is based on an intricate overdeveloped subjective construction, in most cases, impossible to prove. When the material element takes shape, in particular, during the *iter criminis*, it already foreshadows a more serious crime, the criminalisation of the initial offence proving useless;
- some criminal content established by minimum rules are typical examples of "*preventive justice*". The most common cases are those in the field of terrorism and the combating of illegal immigration. We note here a hyper-criminalisation generated by the minimum rules established by the EU legal acts, rigorously analysed by V. Mitsilegas and J.A.E. Vervaele, the latter author plastically labelling the phenomenon, under the name of "*crimmigration*";
- some actions, whose criminalisation is required by minimum rules, do not have the aptitude to achieve their declared purpose;
- the absolute ineffectiveness of Council Framework Decision 2009/948/JHA on the prevention and settlement of conflicts of jurisdiction in criminal proceedings;
- EU does not require Member States to provide for the criminal liability of legal persons. All it requires in this matter is for the Member States to apply effective, dissuasive and proportionate sanctions to legal persons;
- the only legal act that lays down concrete provisions on the statute of limitation is the PIF Directive. We consider that this situation is related to the CJEU jurisprudence in the *Taricco I and II* cases.

Regarding the procedural aspect of the criminal dimension of the European Union's space of justice, we note that the fundamental principle is the mutual recognition of judgments and judicial decisions. This principle generates a horizontal integration of the space of justice, but in order to be truly applicable, it also requires the contribution of a

form of vertical integration, subsidiary to it and consisting in the harmonisation of some elements of the criminal procedure, in particular those regarding the fundamental rights applicable in criminal proceedings.

The horizontal solution of integration, identified and widely applied by the European Union in the area of justice, that of the principle of mutual recognition, based on mutual trust between Member States, is also enshrined in the US Constitution, Article IV section 1, “*Full Faith and Credit*” and section 2, in particular paragraph 2 thereof, the “*Interstate Extradition Clause*”. The latter has many features similar to the European arrest warrant, both of which are based on the trust that the member states of the American Federation, respectively those of the European Union, owe each other. The jurisprudence of the US Supreme Court and other federal courts has been analysed in this thesis, highlighting the following:

- the inter-state extradition is, in fact, a form of surrender because the requested state, through its governor, cannot reject it;
- the inter-state extradition is not conditioned by double criminality, being sufficient for the offense for which the prosecution, trial or execution of punishment is requested to be criminalised in the requesting state;
- upon receipt of the request, the governor of the requested State shall be required to order the arrest of the fugitive;
- the justice of the requested State may intervene only through *habeas corpus*, but may not prevent the surrender;
- neither the governor nor the justice of the requested State shall have the right to verify the fulfilment of the conditions of arrest ordered by the authorities of the requesting State.

It follows that, unlike the EAW, which involves a procedure free from the intervention of any political factor, which takes place only between the judicial authorities of the Member States, the US Constitution provides for a purely administrative but compulsory surrender procedure, without the condition of the double criminality and the possibility for the authorities of the requested State to carry out a legal control on the arrest in the requesting State.

Characteristic of the US legal system are also uniform laws, ie models of legal acts recommended for adoption by the States of the Union, which are not, however, binding and do not stem from federal legislative or executive authorities. Uniform laws are forms of legal harmonisation between the States of the Federation. In the matter of inter-state extradition, there are two such uniform laws, UCEA<sup>151</sup> and UERA<sup>152</sup>, both strengthening the “*surrender*” model to the detriment of the “*extradition*” model, with a clear tendency to judicialise the procedure. The UERA provides a model of “*rendition*” directly based on a warrant, very close to the European one and which has an exclusively judicial circuit. The disadvantage of uniform laws, however, is that they apply only between the States of the Federation that have adopted them. Thus, UERA is still a rare model.

Our conclusion is that the principle of mutual recognition, based on mutual trust between States, is specific to federalism. The provisions of art. IV of the US Constitution and, in particular, the *Full Faith and Credit Clause* and the *Inter-State Extradition Clause*, may have been the Union's inspiration for endorsing and developing the British proposal

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<sup>151</sup> USA, The Uniform Criminal Extradition Act (UCEA), 1936.

<sup>152</sup> USA, The Uniform Extradition and Rendition Act (UERA), 1980.

(Jack Straw) to establish mutual recognition as the basic integration principle, also in the criminal dimension of the EU justice area, thus removing the priority of harmonisation and, especially, of legislative unification, the latter a method that characterises the unitary state.

Mutual recognition and the EAW also inspired the Council of Europe. Thus, the Third Additional Protocol to the European Convention on Extradition introduced a simplified extradition procedure, in which the formal request is no longer necessary if the requested person consents to extradition.

We have followed some of the EU procedural directives in interaction with the principle of mutual recognition of criminal judicial decisions, in particular from the perspective of CJEU case law. A relevant example, in this matter, is the issue of the criminal trial, that has to take its course preferably in the presence of the accused, the obligation of courts to summon and inform him/her on the date and place of the trial and the guarantee that *in absentia trials* should be retried in the presence the defendant, whenever the latter so requests. Based on the CJEU judgment in *Melloni v Ministerio Fiscal*, where the Court upheld the supremacy of Union law, which obliged Spain to surrender Stefano Melloni on the basis of an EAW issued by Italy, following his *in absentia* trial, we noticed that, in a very short time, Union law, by Framework Decision 2009/299/JHA and by Directive (EU) 2016/343, turned, on the contrary, to the solution foreshadowed by the Constitutional Court of the Kingdom of Spain.

We analysed the procedural directives (those on the right to interpretation and translation, the right to information, the right to have access to a lawyer, the right to inform a third party and consular authorities in case of arrest, the strengthening of aspects of the presumption of innocence, the right to be present at the trial and the rights of children who have the status of suspects or accused), as well as the essential jurisprudence of the CJEU in this field (CJEU judgments in the cases: *Gavril Covaci*<sup>153</sup>, *EP*<sup>154</sup>, *Gianluca Moro*<sup>155</sup>, *Nikolay Kolev, Milko Hristo and Stefan Kostandinov*<sup>156</sup>, *Emil Milev*<sup>157</sup>, *DK*<sup>158</sup> etc.). Along with some authors, we have found that fundamental rights in criminal proceedings, as established in the EU directives, are not as well defined and structured as in the ECHR case law. However, this does not deny the value of those directives, which allow "*the common interpretation of its rules by the ECJ and the possibility of resorting to EU instruments and institutions to enforce compliance*"<sup>159</sup>, but especially because they make available to police, prosecutors and judges in the AFSJ an effective guidance to verify the compatibility of the practices and decisions they adopt with the minimum acceptable rules on the fundamental rights of suspects / accused persons in the EU, including, where appropriate, by way of preliminary referrals. We consider that one of

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<sup>153</sup> CJEU, Judgment, 15 October 2015, *Gavril Covaci*, C-216/14, EU:C:2015:686.

<sup>154</sup> CJEU, Judgment, 19 September 2019, *EP*, C-467/18, EU:C:2019:765.

<sup>155</sup> CJEU, Judgment, 13 June 2019, *Gianluca Moro*, C-646/17, EU:C:2019:489.

<sup>156</sup> CJEU, Judgment, 5 June 2018, *Nikolay Kolev, Milko Hristo and Stefan Kostandinov*, C-612/15, EU:C:2018:392.

<sup>157</sup> CJEU, Judgment, 27 October 2016, *Emil Milev*, C-439/16 PPU, EU:C:2016:818.

<sup>158</sup> CJEU, Judgment, 28 November 2019, *DK*, C-653/19 PPU, EU:C:2019:1024.

<sup>159</sup> **Lorena Bachmaier Winter**, *The Eu Directive on the Right to Access to a Lawyer: A Critical Assessment*, in **Stefano Ruggeri**, Editor, *Human Rights in European Criminal Law. New Developments in European Legislation and Case Law after the Lisbon Treaty*, Springer International Publishing, Switzerland, 2015, p. 130.

the most important rules contained in these directives is that which obliges the authorities to hand over to any suspect / accused person, from the first contact, a note on rights, in a language they understand<sup>160</sup>. We express our doubts, however, that this rule is a concrete reality in the work of the police, prosecutors and judges in all cases and in all Member States.

Both in the case of the harmonisation of the Member States substantive criminal law and in the case of mutual recognition and subsequent harmonisation of some of the rules of criminal procedure, the powers of the Union are limited, *inter alia*, by public order. This notion is vague and, in our view, does not meet the requirements of the principle of legal certainty, which is why we propose the formulation in Union law of a clear definition of the concept, in the context of judicial cooperation in criminal matters. The objection that could be raised to such a proposal would be the one that public order is a strong identity concept, so that only each Member State can establish it and invoke it. We are of the opinion, however, that, unlike judicial cooperation in civil matters, in which public order has a much broader content, in the case of criminal judicial cooperation, public order is more restricted, consisting of only a few essential elements of the criminal law system, such as: amnesty; immunity; age of criminal liability; trial *in absentia* and sentencing to life imprisonment<sup>161</sup>.

As a basis for the principle of mutual recognition of judicial decisions in criminal matters is the principle of mutual trust, the latest developments, still in the draft phase, but which have obtained the agreement of the Council ("*E-evidence Legislative Package*"), even requiring mutual trust to be placed at the same level as mutual recognition, as a principle generating effects on the horizontal integration of the Union's area of justice in its criminal dimension. Where a service provider established or providing services on the Union's market is obliged to comply with a judicial decision, which aims at collecting evidence in a criminal investigation and that is issued by the judicial authority of a Member State other than the one in which the service provider is established, we can no longer talk about mutual recognition, but about mutual trust or, as we already mentioned, a judicial cooperation of a new generation, which we called "*fuzzy*".

As in the case of legal acts laying down minimum rules on offences and penalties, we presented a structural paradigm of the legal acts of the Union establishing rules and procedures that ensure the application of the principle of mutual recognition. Some of the conclusions that emerge from this analysis are:

- the evolution of the legal acts trends was analysed from a historical perspective: from framework decisions to directives and, more recently, to regulations. It points out that the Union tends in this area towards legal unification, depriving Member States of the national margin of appreciation they had by framework decisions and directives. This trend brings more clarity and legal certainty, contributing to a superior regulation;
- the development in progress of a process which tends to replace the warrants or orders, specific to this type of legal acts, with the certificates representing them. This "*literality*"

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<sup>160</sup> A first model of such a note, at EU level, was designed by **Taru Spronken**, *An EU-Wide Letter of Rights. Towards Best Practice*, Ius Commune Europaeum, Intersentia, Cambridge-Antwerp-Portland, 2010, p. 69 *et seq.*

<sup>161</sup> This opinion is based on **Koen Lenaerts**, *La vie après l'avis: Exploring the Principle of Mutual (yet not Blind) Trust*, *Common Market Law Review* 54, *Kluwer Law International*, 2017, p. 823, 824.

acquired by the certificates facilitates the free movement of criminal judicial decisions throughout the Union;

- the development in Union law of the *ne bis in idem* principle, from its primitive, unrefined form, set out in the Charter of Fundamental Rights of the European Union and in Protocol no. 7 to ECPHRFF, to a complex and quasi-complete form, set out by art. 54 *et seq.* CISA and the CJEU jurisprudence. The ECJ case law in *Van Esbroek*, *Van Straten*, *Gözütök and Brügger*, *Norma Kraaijenbrink*, *Gaetano Mantello* and *Jürgen Kretzinger* continues to be based on the definition of "same facts" from ECHR case-law from as far as *Zolotuhin v. Russia*<sup>162</sup>;

- the provision of the right to "stay" as a case of optional non-execution of the EAW, based on the freedom of movement and establishment of persons and a consequence thereof, conceived as to attend the need to ensure social reintegration of the convict, post-execution of a custodial sentences in the Member State in which he/she has decided to settle and to which he/she has stronger links than in the citizenship State - CJEU jurisprudence in the cases of *Szymon Kozłowski*<sup>163</sup>, *Dominic Wolzenburg*<sup>164</sup>, *IB*<sup>165</sup>, *João Pedro Lopes Da Silva Jorge*<sup>166</sup>.

In relation to all the above, we conclude that the structural paradigms of the EU legal acts belonging to the criminal dimension of the EU space of justice are increasingly coherent in relation to the legal principles specific both to the Union general law and the criminal law/ criminal procedure of the Member States. Pending the new generation of legal acts, which are now in the draft and which promote the regulation, as the type of legal act currently considered the most appropriate to ensure the conditions for mutual recognition of judicial decision, we consider that, despite the complex, sophisticated nature of the criminal dimension of the Union's space of justice, its legal acts are due to generate the expected effects of combating serious criminality in the European Union.

Two chapters of the doctoral thesis are devoted to the protection of EU financial interests through criminal law and, respectively, through the action of the European Public Prosecutor's Office. We consider these issues to be fundamental in relation to the criminal dimension of the European Union's space of justice for the following reasons:

- financial interests are the only interests of the European Union that benefit from criminal protection;

- the financial interests of the Union are in part interests of the Member States as important beneficiaries of European funds. On the other hand, the practice shows us that Member States do not sufficiently internalise this reality and therefore do not apply the principle of assimilation in a convincing way;

- the idea of a European Public Prosecutor's Office developed essentially the legal reflection on an area of justice of the Union in its criminal dimension, *Corpus Juris*, the Green Paper, but also the first variant of the Commission Proposal of a EPPO Regulation (from 2013) using concepts such as "*European judicial space*" or "*single legal space*";

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<sup>162</sup> ECHR, Judgment, 10 February 2009, *Zolotuhin v. Russia*, application no. 14939/03, CE:ECHR:2009:0210JUD001493903.

<sup>163</sup> CJEU, Judgment, 17 July 2008, *Szymon Kozłowski*, C-66/08, EU:C:2008:437.

<sup>164</sup> CJEU, Judgment, 6 October 2009, *Dominic Wolzenburg*, C-123/08, EU:C:2009:616.

<sup>165</sup> CJEU, Judgment, 21 October 2010, *IB*, C-306/09, EU:C:2010:626.

<sup>166</sup> CJEU, Judgment, 5 September 2012, *João Pedro Lopes Da Silva Jorge*, C-42/11, EU:C:2012:517.

- the EPPO is the first criminal investigation and prosecution authority of the European Union. Here that, before having a joint police force (EUROPOL not being such a force), the Union has its own prosecutor's office. This reality far exceeds the vision that until recently was predictable in the matter of the criminal dimension of the EU justice space.

The history of the EU financial interest's protection is as old as the Union and, previously, the European Communities, because the financial interests are inextricably linked to the budget of the Communities / Union. However, the forms in which this protection was achieved diachronically are dependent on the period. Thus, in the longest stage, from the beginning of the existence of the Communities, the protection of financial interests was achieved through national measures, taken by the Member States, which could consist of controls, inspections and administrative or financial sanctions, as well as criminal investigations and the imposition of punishment for various offences under the national law, without them bearing the collective label of PIF offences, as would subsequently occur. During this time, Member States applied the principle of assimilation (or equivalence of protection) not because they were necessarily obliged to do so, but because the offences they investigated and prosecuted, of a purely national nature, were taken seriously by law enforcement agencies and prosecutor's offices. We must take into account, both in terms of administrative investigations and criminal investigations, their smaller number, the smaller volume of work required to bring them to justice, directly proportional to the volume of commercial and financial transactions that took place at that time, in the conditions of a lower technological development, of a simple society compared to the contemporary one and, especially, of an exchange of goods, people and services between States that has no terms of comparison with the current reality. Also, the number of Member States of the Communities / Union was a lot lower than at present (in a maximum ratio of 6:27).

With the exception of national control mechanisms, over time, the first forms of Community administrative control began to emerge as to how Community funds were spent in a single area, that of the common agricultural policy. It started with agriculture because it has been the predominant economic branch for a long time in the contemporary history of Europe and, at the same time, because it is an area that constantly needs, including now, intense Community / Union programs to support it, to be able to face the increased global competition, made even fiercer by market liberalisation developments through the GATT and then through the WTO. Thus, CAP was the first area where the need arose for the Communities involvement in the control of European funds and in the administrative investigation regarding misconduct in the EU programmes management.

We believe that, even at present, Union funds for agriculture are subject to a significant number of frauds, which is also indicated by a certain abundance of CJEU rulings on disputes relating to the implementation of the programmes involving such funds.

Administrative investigations at Community (then Union) level have developed extensively in terms of regulation, organisation and operationalisation. Although they have been within the Commission's competences at the beginning, the Commission has developed over time, first a task force with this mission, then an anti-fraud office (OLAF).

The criminal dimension of the protection of EU financial interests began to be present in the legal framework of the Union only after the Treaties recognised it, first through the

intergovernmental competences under the third pillar of the Union (justice and home affairs), which allowed the first form of harmonisation of the substantive criminal law as a basis for combating PIF offences, by the 1995 Convention, based on art. K.3. TEU and then, post-Amsterdam, by creating the Union's AFSJ. At a moment favourable to the inclusion of criminal law and criminal procedure in the competences of the Union, through judicial cooperation in criminal matters, the Lisbon Treaty and the Stockholm Program would outline the current framework of the criminal dimension of combating offences to EU financial interests.

This achievement is largely due to the development in the European Union law of the concept of "*space*" (or "*area*"), with the meaning of territory within common rules are enacted and applied in a given area of the Union's competences, thus generating a higher legal integration than that of other areas. The space appears to be largely related to, but not to be confused with, enhanced cooperation. Thus, to date, no "*space*" developed or integrated by the Union is perfectly overlapping the EU's borders (see: AFSJ, the Schengen area, the European Economic Area, SEPA - Single Euro Payments Area etc.).

In the analysed context, we were particularly interested in the AFSJ, in which we consider that new subspaces have been created and continue to be created. An example of such a subspace is the one in which the European Public Prosecutor's Office will operate. It is also a good example of the link between "*spaces*" and enhanced cooperation. EPPO was set up on the latter route, provided by art. 86 TFEU, but possible for any legislative initiative in the field of judicial cooperation in criminal matters.

Corpus Juris launched, for the first time, the concept of a "*single European legal space*", meaning a territory belonging to the Union, in which the area of combating fraud against financial interests by means of criminal law is unified by common rules of substantive criminal law and criminal procedure, rules applied by the European Public Ministry (the establishment of which was proposed). The European legal space in the Corpus Juris is open, with every European Public Ministry prosecutor having the opportunity to investigate PIF fraud in any Member State, and the evidence obtained being admissible before any court belonging to that space. Thus, the national borders disappear and the space is fully unitary. The limits of this project were seen, analysed and criticised at that stage, in particular by the Member States, scientific researchers and civil society who shared a much more conservative view of such a high level of EU legal integration, all the more so as it was a matter of criminal justice, a much more sensitive area than others for the Member States sovereignty.

The notion of a "*single space*" in the context of combating PIF offences has also been maintained in the Green Paper and even in the Commission's proposal from 2013 for a Council Regulation establishing a European Public Prosecutor's Office. Formally, in the text of the EPPO Regulation, it was abandoned. We consider, however, that giving up the use of this terminology has not really changed the legal paradigm structuring the European Public Prosecutor's Office. We should not omit, in this respect, that the "*single space*" covered by the studies, communications and the Commission Proposal for a Regulation concerned not only the establishment of the EPPO, but also the substantial criminal law which this EU body will apply. In this context, we should see in the legislative package constituted by the EPPO Regulation and the PIF Directive precisely

the legal basis of this space, in which the criminal dimension of combating offences against the EU financial interests is fully manifested.

Of course, these are not the only normative components of such a space. Among them there are the mechanisms for ensuring fundamental rights and freedoms in criminal matters: the provisions of the Charter of Fundamental Rights of the Union, these of the European Convention for the Protection of Human Rights and Fundamental Freedoms; the case law of the Luxembourg and Strasbourg Courts; Union procedural directives on the rights in criminal proceedings; directives for harmonisation by minimum rules of offences and sanctions in other criminal areas, inextricably linked to PIF offences (money laundering, organised crime, market abuse, etc.); legal acts of the Union in the field of judicial cooperation in criminal matters, including those based on the principle of mutual recognition of judgments and judicial decisions (such as JIT, EAW or EIO) and legal acts governing the work of bodies, offices and agencies on the same topics (Eurojust, Europol, OLAF).

For a full understanding of such an approach, we must also take into account the fact that "*legal spaces*" have a greater or lesser degree of integration. While the "*single European legal space*" of the Corpus Juris was based on a very advanced model of integration of the field, the exact term being that of "*legislative unification*", other spaces have a lower degree of integration. In this context, we consider that the level of integration required by a current legal space built around the criminal dimension of EU's financial interests protection (with a core comprising the PIF Directive and the EPPO Regulation) is much narrower, however, in no way unimportant and, especially, ineffective. The rules and structures of this space are largely anchored in the national law of the Member States. Thus, in the case of the PIF Directive, legislative harmonisation was based on minimum rules, and not on bringing legislation closer to a higher level of integration, as envisaged in the Green Paper or on unification, as proposed by the Corpus Juris. The transposition of the PIF Directive by the Member States results in relatively different national rules, perhaps too different, possibly even forming a "*patchwork*" system, as some authors qualifies it (including J.A.E. Vervaele, one of the Corpus Juris parents)<sup>167</sup>.

The EPPO Regulation is also based on its complementarity with the national law of the Member States in the criminal investigation phase, which *de facto* amounts to giving a very important weight to national laws. However, in the field of criminal procedure, there is no Union legislative act relating to means of investigation, and the Regulation harmonises at least six of them, ie very few (compared to the 21 means of investigation unified by Corpus Juris). Moreover, going beyond the framework of the Treaties, in this case the provisions of art. 86 para. (3) TFEU, the EPPO Regulation does not provide for the rules of procedure applicable to the European Public Prosecutor's Office, leaving them to its college. Such delegation of powers by the Council, acting unanimously to a college of a Union body, acting by a qualified majority, is in breach of the Treaties.

The uncertainties left by the EPPO Regulation in the matter of substantive criminal law and criminal procedural law applicable to a case (existing despite a remarkable rationalisation effort) are likely to lead to a highly variable level of protection of the

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<sup>167</sup> **John A.E. Vervaele**, *The Material Scope of Competence of the European Public Prosecutor's Office: Lex incerta and unprevia? op. cit*, p. 422.

fundamental rights in the criminal investigations conducted by EPPO and in the criminal proceedings applicable to the trial of the case. However, given the jurisprudence of the CJEU in *Melloni*, this should not be a concern as long as the standards of fundamental rights are within the limits of the Charter.

The analysis we have undertaken of particular chapters and provisions of the EPPO Regulation has allowed us to identify many legal issues that have been offered counterintuitive and sometimes worrying solutions, such as those on the following topics:

- the professional autonomy of the EDP (inexistent);
- the extremely complicated internal hierarchical structure, which seems to be built more on the idea of absolute control over investigations than on their effectiveness and celerity;
- the uncertainty, persistent throughout the investigation and even at the time of the prosecution of the accused person, regarding the applicable criminal law, both substantive and procedural;
- the increased dysfunction of the way in which cross-border investigations are designed, through a more complicated system than the generic one, that of the European investigation order;
- the elliptical formulation of the principle of free movement of evidence;
- the lack of direct judicial review by the CJEU regarding the EPPO's internal rules of procedure, College's general guidelines and guidelines;
- judicial review of acts intended to produce effects vis-à-vis third parties, attributed to the competent national courts, where those acts were drawn up on the basis of decisions belonging to the European components of the European Public Prosecutor's Office, which in turn is a Union body;
- the model of judicial cooperation proposed by the Regulation in relation to Member States not participating in the enhanced cooperation and, in particular, to third countries (involving the use by the EDP in the investigation of international agreements to which its own Member State is a party, but not the Union).

These solutions were largely derived from the EPPO's collegial system imposed by the Council. On the other hand, however, the collegial system gives superior legitimacy to EPPO decisions, which should not be neglected.

At this time, due to the need to reorganise the work between OLAF, the national prosecutor's offices and AFCOS to identify and conduct administrative / criminal investigations into fraud against the EU financial interests, through the expected operationalisation of the EPPO, there is in the course of legislative procedure the Commission Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No. 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) as regards cooperation with the European Public Prosecutor's Office and the effectiveness of OLAF investigations<sup>168</sup>. Considering that OLAF's administrative investigations may relate to facts belonging to the administrative criminal law or, even when referring to facts set out by the administrative law, the evidence collected in the course of investigations may continue to be used in a criminal case, so we find necessary to set out the obligation of OLAF to comply with the procedural guarantees established by the Union in criminal matters.

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<sup>168</sup> COM (2018) 338 final, Bruxelles, 23.5.2018, legislative procedure 2018/0170 (COD).

We are currently limiting ourselves to the observations above highlighted and the comments made in relation with the structure and organisation of the European Public Prosecutor's Office because it is not yet functional. We are waiting for the EPPO practice to confirm our ideas or, on the contrary, to refute our conclusions.

However, it is foreseeable that the PIF Directive and the aspects mentioned from the EPPO Regulation will result in a "*mosaic*" system of applicable legal rules, with issues of coherence, certainty, predictability and proportionality. We have no doubt that it will be a difficult task for the CJEU to adjudicate on a number of cases, in particular through preliminary rulings, in order to streamline the application of the Regulation, especially in its articulation points with the national transpositions of the PIF Directive.

Finally, the conclusion of this doctoral thesis is that the European Union, seen as a legal and judicial space, both subspaces of the area of freedom, security and justice, in their purely legal, but also geographical, topological and anthropological sense, is endowed with a criminal, transversal, *ultima ratio* and *de minimis* dimension. This generates a sufficient level of harmonisation in the criminal law and criminal procedure of the Member States to ensure the effectiveness of the integration of the space of justice, the mutual recognition of judgments and judicial decisions, based on mutual trust, both presumed and real between Member States. The criminal dimension of the European Union's space of justice is a synthesis between the security, identity, auxiliary aspects of the Union's policies and that of guaranteeing and respecting the fundamental rights and freedoms. This dimension interacts with the Union's common foreign and security policy, implementing instruments of international law, derived from global and regional policy, within the space of justice. Although there is no European Union criminal law because the power to criminalise still belongs only to the Member States, the criminal dimension of the space of justice encompasses the Union's criminal policies, structured on the basis of its interests which, in most cases, coincide with those of the Member States, being in direct relation to the reality of the criminal phenomenon in the whole area of justice, reuniting geographically the territories of the Member States of the Union, with some variable elements. The Union's criminal policies are structured on the basis of the criminology outputs. A special feature of the criminal dimension of the judicial space is the combating of fraud against the Union's financial interests which, under the principle of assimilation, should operate in each Member State in the same way as if the national financial interests would be jeopardized or harmed. Because of the lack of internalisation and application by the Member States of the principle of assimilation, the Union has been put in a position to set up a body to investigate and prosecute before national courts the most serious fraud against its financial interests, the Public Prosecutor's Office European. The Union's solution is unique in that it does not have its own criminal law and criminal procedure, but has its own prosecutor's office, which will apply in its activities a plurality of legal rules, some unified (through the EPPO Regulation), others harmonised (e.g. by the PIF Directive), and others specific only to a certain Member State. In order to make possible the functioning of this Prosecutor's Office with such a "*mosaic*" of rules, characterised by some authors as "*patchwork*", its Regulation establishes the principle of free movement of evidence. But evidence is not a court's decision (to be recognised as such) and in some Member States, which practice the exclusionary rule (or principle),

assessing the legality of their production or collection, even in relation to the law of the State where they were produced or collected, will prove to be a real challenge.

The criminal dimension of the European Union's justice space lacks substantial, serious approaches to the rule of law, as a value of the European Union. Issues such as the independence of courts and judges are dealt with only in certain contexts, and the professional autonomy of prosecutors, well-founded at Council of Europe level, is completely lacking in the Union's concerns. The EU has shown no interest in setting minimum standards for conditions of detention, even by the case law of the CJEU, and the issue has been circumvented and placed under the authority of ECHR jurisprudence.

Therefore, in the final conclusion of this doctoral thesis, we consider necessary for the Union, in the next period, to focus on transforming the rule of law value, set out by the Treaties, into a concrete reality and not a presumed one, through decisive demarches, made in particular by adopting relevant legal acts.

### **DE LEGE FERENDA PROPOSALS**

1. Modification of art. 83 para. (2) TFEU for the inclusion of racism, anti-Semitism, xenophobia, discrimination, incitement to hatred and hate speech based on membership of a national minority, ethnicity, race, colour, ethnic or social origin, sexual orientation or disability in the list of '*Eurocrimes*'.
2. The elaboration of a new directive on the status and rights of victims of crime, which expressly provides for their right to participate, as parties (or participants) in the criminal proceedings and trial, and the guarantee of equal and symmetrical rights with those of the suspects / accused persons.
3. The introduction in the Treaties of a generic text setting out the necessity for Member States to guarantee the independence of the judiciary and the autonomy of public prosecutors, as an essential component of the rule of law and the adoption by the Union of a legal act defining the concepts to which we have referred, establishing minimum rules for their assurance, for the purpose of mutual recognition of judgments and judicial decisions and setting out, expressly, concrete sanctions for non-compliance with the imposed standards. Even in the absence of amendments to the Treaties, such a legal act could be adopted pursuant to art. 82 para. (2) (d) TFEU, where the Council identifies, by a decision, the independence of the judiciary as an element of criminal procedure in which minimum rules need to be laid down for the mutual recognition of judgments and judicial decisions. Sanctions should include, in particular, the refusal to recognise the judgments and judicial decisions issued in breach of those rules and the general non-recognition of such acts in the case of a certain Member State, guilty of concrete and repeated non-compliance with the rule of law, as a value of the Union.
4. The statement, always, in the preamble of the directives adopted pursuant to art. 83 TFEU, of the legitimate purpose of the minimum rules imposed on Member States and the demonstration of how that purpose can be achieved by those rules in a concrete way.
5. The completion of art. 6 of the Protocol (No. 2) to the Treaties on the application of the principle of subsidiarity and proportionality with a provision expressly setting out the necessity for the Parliaments / Parliamentary Chambers of the Member States to assess

also the principle of proportionality and not only the subsidiarity. The title of the document to be adopted should be: "*opinion on subsidiarity and proportionality*".

6. The provision of the principle of criminal liability only for *mens rea* committed offences, *nulla poena sine culpa*, in the case of natural persons, in the Charter of Fundamental Rights of the European Union.

7. The adoption of a new legal act of the Union, based art. 82 para. (1) (b) TFEU, laying down clear rules on the criteria applicable to the determination of jurisdiction in the event of a positive conflict and on its award in the event of a negative conflict.

8. Adoption by the European Union of a legal act laying down minimum rules on the conditions for the detention of persons, whether pre-trial detention or detention as execution of a judgment of imprisonment. We consider that such a legal act (a directive) could be adopted pursuant to art. 82 para. (2) (b) TFEU.

9. The adoption in the legislative procedure 2018/0170 (COD) regarding the Commission Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No. 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) as regards cooperation with the European Public Prosecutor's Office and the effectiveness of OLAF investigations, COM (2018) 338 final, of an amendment setting out the assurance in the investigation procedures carried out by OLAF of the procedural rights specific to the criminal investigation and trial, mainly those set out by the EU procedural directives adopted pursuant to art. 82 para. (2) (b) TFEU.

10. The adoption by the EU of legal acts for the purpose of defining the concept of the rule of law (*Rechtsstaat, État de droit*), identifying substantial criteria for this value of the European Union, closely linked to guaranteeing and respecting fundamental rights and freedoms, but with a much broader content, involving the restriction of national Parliaments, but also of the European Parliament and the Council, to legislate beyond the principles of paramount importance, which form the hard core of the rule of law. The external independence of courts and prosecutor's offices, the independence of judges and the professional autonomy of prosecutors are such key principles, relevant in the criminal dimension of the European Union's space of justice. A source of inspiration for the elaboration of such legal acts could be the Council of Europe acquis, the jurisprudence of the ECHR and the incipient jurisprudence of the CJEU in this matter.

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